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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF MARYLAND, *et al.*,

Appellants,

v.

UNITED STATES OF AMERICA AND AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOINT JURISDICTIONAL STATEMENT OF THE STATES OF MARYLAND, ARIZONA, DELAWARE, MISSOURI, NEW HAMPSHIRE, NORTH CAROLINA, TENNESSEE AND WISCONSIN, THE COMMONWEALTH OF VIRGINIA, THE PUBLIC SERVICE COMMISSIONS OF ALABAMA, KENTUCKY, TENNESSEE, WEST VIRGINIA AND WISCONSIN, THE PUBLIC UTILITIES COMMISSION OF SOUTH DAKOTA AND THE VIRGINIA STATE CORPORATION COMMISSION

STEPHEN H. SACHS
Attorney General of Maryland
CHARLES O. MONK, II
Assistant Attorney General and
Chief, Antitrust Division
Counsel of Record
ALAN M. BARR
Assistant Attorney General
The Munsey Building
7 North Calvert Street, 3rd Flr.
Baltimore, Maryland 21202
(301) 576-6470
Attorneys for the State of Maryland

December 8, 1982

ROBERT K. CORBIN
Attorney General
ANTHONY B. CHING
Solicitor General
1275 Washington Street
Phoenix, Arizona 85007
(602) 255-3333
Attorneys for the State of Arizona

JOHN D. ASHCROFT
Attorney General
EDWARD D. ROBERTSON, JR.
Deputy Attorney General
P.O. Box 899
Jefferson City, Missouri 65102
(314) 751-3321
Attorneys for the State of Missouri

H. A. COLE, JR.
Special Deputy Attorney General
Chief, Antitrust Division
FRED R. GAMIN
Assistant Attorney General
North Carolina Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602
(919) 733-3786
Attorneys for the State of North Carolina

RICHARD S. GEBELEIN
Attorney General
VINCENT AMBERLY
Deputy Attorney General
820 North French Street
Wilmington, Delaware 19801
(302) 571-2514
Attorneys for the State of Delaware

GREGORY H. SMITH
Attorney General
EDWARD E. LAWSON
Antitrust Counsel
State House Annex
Concord, New Hampshire 03301
(603) 271-3640
Attorneys for the State of New Hampshire

WILLIAM M. LEECH, JR.
Attorney General
WILLIAM J. HAYNES, JR.
Deputy Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-2672
Attorneys for the State of Tennessee

BRONSON C.
LAFOLLETTE
Attorney General
MICHAEL L. ZALESKI
Assistant Attorney General
KEVIN J. O'CONNOR
Assistant Attorney General
Antitrust and Criminal
Litigation Unit
P.O. Box 7857
Madison, Wisconsin 53707
(608) 266-3016
Attorneys for the State of
Wisconsin

MARK D. WILKERSON
Special Assistant Attorney
General
EUELL SCREWS
Assistant Attorney General
State Office Building
339 Dexter Avenue
P.O. Box 991
Montgomery, Alabama 36102
(205) 832-6282
Attorneys for the Alabama
Public Service Commission

HENRY M. WALKER
General Counsel
State of Tennessee
Cordell Hull Building
Nashville, Tennessee 37219
(615) 741-3191
Attorney for the Tennessee
Public Service Commission

GERALD L. BALILES
Attorney General
WILLIAM G. BROADDUS
Chief Deputy Attorney
General
ELIZABETH B. LACY
Deputy Attorney General
ANTHONY
GAMBARDELLA
Assistant Attorney General
101 8th Street
Richmond, Virginia 23219
(804) 786-4076
Attorneys for the
Commonwealth of Virginia

WILLIAM M. SAWYER
ELLYN ELISE CRUTCHER
PAUL M. CUPP
JOHN H. HUGHES
730 Schenkel Lane
Frankfort, Kentucky 40602
(502) 564-7347
Attorneys for the Kentucky
Public Service Commission

ROBERT RODECKER
General Counsel
JOEL B. SHIFMAN
Telecommunications Attorney
Legal Division
State Capital
Charleston, West Virginia
25305
(304) 348-3890
Counsel for the Public Service
Commission of West
Virginia

PHILIP J. MAUSE
Kadison, Pfaelzer, Woodard, Quinn & Rossi
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 452-8300
Attorney for the Wisconsin Public Service Commission

RUSSELL W. CUNNINGHAM
Associate General Counsel
SHERRY H. BRIDEWELL
Attorney
P.O. Box 1197
Richmond, Virginia 23209
(804) 786-8671
Attorneys for the Virginia State Corporation Commission

JAMES M. LYONS
FREDERICK J. BAUMANN
1600 Broadway, Suite 2400
Denver, Colorado 80202
MARCUS W. SISK, JR.
Sisk, Foley, Hultin & Driver
2501 M Street, N.W.
Washington, D.C. 20037
Attorneys for the South Dakota Public Utilities Commission

QUESTION PRESENTED

In framing injunctive relief under the Sherman Act, may a court direct persons to violate or disregard State law and State action that implement state policy to preserve adequate, economical and universal intrastate telephone service and that are placed outside the reach of the Sherman Act by the State Action Doctrine?

PARTIES TO THE PROCEEDING IN THE DISTRICT COURT

In addition to the United States, American Telephone and Telegraph Company ("AT&T"), Western Electric Company, Inc. and Bell Laboratories, Inc., the District Court made the following parties intervenors by Orders of August 26, 1982, and October 14, 1982, Joint Appendix to Jurisdictional Statements of Appellants ("J.A.") at 191-94, 201-03: Ad Hoc Telecommunications Users Committee; American Newspaper Publishers Association; American Petroleum Institute; American Satellite Company; Associated Telephone Answering Exchanges, Inc.; Association of American Railroads; Association of Data Communications Users; Association of Data Processing Service Organizations; Audichron Company; Black Citizens for a Fair Media; California Hispanics; Citizens Utilities Company; Communication Commission of the National Council of the Churches of Christ in the USA; Communications Workers of America; Compuserve, Inc.; Computer and Business Equipment Manufacturers Association; Computer and Communications Industry Association; Congress Watch; Continental Telecom, Inc.; D/FW Signal, Inc.; Education and Cultivation Division of the General Board of Global Ministries of the United Methodist Church; Federal Communications Commission; General Dynamics Communications Co.; General Telephone & Electronics Corp.; Independent Data Communications Manufacturers Association; Independent Telecommunications Suppliers' Council; International Telephone and Telegraph Corp.; Jack Faucett Associates, Inc., *et al.*; Leghorn Telepublishing Co.; MCI Com-

munications Corp.; Mobile Marine Radio, Inc.; National Association for the Advancement of Colored People; National Association for Better Broadcasting; National Association of Broadcasters; National Association of Regulatory Utility Commissioners; National Association of State Utility Consumer Advocates; National Cable Television Association; National Catholic Broadcasters Association; National Citizens Committee for Broadcasting; National Latino Media Coalition; National Newspaper Association; North American Telephone Association; Northeastern Telephone Co.; Office of Communication of the United Church of Christ; Reformed Church in America; Rogers Radio Communication Services, Inc.; Rural Telephone Coalition; San/Bar Corp.; Satellite Business Systems; Sonitrol Distributors Council, Inc.; Southern Pacific Communications Company; Sperry Corporation; Stromberg-Carlson Corp.; Tandy Corporation; Telocator Network of America; U.S. Telephone Communications, Inc.; United States Independent Telephone Association; United States Telecommunications Suppliers Association; United Telecommunications, Inc.; Utilities Telecommunications Council; Warner Amex Cable Communications, Inc.; Western Union Telegraph Co.; Westinghouse Broadcasting and Cable, Inc.; States of Arizona, California, Colorado, Delaware, Illinois, Maine, Maryland, Michigan, Missouri, New Hampshire, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Tennessee, Virginia, Wisconsin; Arkansas Public Utilities Commission; California Public Utilities Commission; District of Columbia Public Utilities Commission; Florida Public Utilities Commission; Idaho Public Utilities Commission; Kentucky Public Service Commission; Michigan Public Utilities Commission; Missouri Public Utilities Commission; Montana Public Utilities Commission; Nebraska Public Utilities Commission; Nevada Public Utilities Commission; New York Public Utilities Commission; South Dakota Public Utilities Commission; Utah Public Utilities Commission; Public Service Commission of West Virginia; Wisconsin Public Service Commission; Wyoming Public Utilities Commission; Iowa Commerce Commission; Kansas Corporation Commission; New Mexico Corporation Commission; Ohio Consumers Counsel; Oklahoma Corporation Commission; Virginia State Corporation Com-

mission; Washington Utilities & Transportation Commission; City of Cincinnati; City of New York; Telephone Equipment Corporation; Pittway Corporation; International Mobile Machines; Centel Corporation; Association of Long Distance Telephone Companies; Illinois Commerce Commission; Telecommunications Association; and Rochester Telephone Corporation.

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

The States of Maryland, Arizona, Delaware, Missouri, New Hampshire, North Carolina, Tennessee and Wisconsin, the Commonwealth of Virginia, the Public Service Commissions of Alabama, Kentucky, Tennessee, West Virginia and Wisconsin, the Public Utilities Commission of South Dakota and the Virginia State Corporation Commission ("State Appellants") respectfully request the Court to note probable jurisdiction of their appeal, pursuant to the Expediting Act, 88 Stat. 1709, 15 U.S.C. § 29(b), from the final judgment of the United States District Court for the District of Columbia, dated August 24, 1982.

OPINION BELOW

The Modification of Final Judgment from which State Appellants appeal was entered on August 24, 1982, and appears in the Joint Appendix to Jurisdictional Statements of Appellants ("J.A.") at 173-90. It has not been reported.

The opinion of the United States District Court for the District of Columbia discussing the legal issues presented in this appeal was entered on August 11, 1982. It has not yet been officially reported. It is unofficially reported in [Part II of Report 555] Trade Reg. Rep. (CCH) and is reprinted in the Joint Appendix at 1-172.

JURISDICTION

This Court has jurisdiction of this appeal from the modification of a consent order entered in a civil antitrust suit brought by the federal Government under section 2 of the Sherman Act pursuant to a certification under the Expediting Act, 88 Stat. 1709, 15 U.S.C. § 29(b), by the United States District Court for the District of Columbia that the interests of justice would be served by immediate appeal to this Court. (J.A. 204-208).

On November 20, 1974, the Department of Justice filed a civil antitrust action against AT&T, Western Electric Company, Inc. and Bell Telephone Laboratories, Inc. alleging violations of section 2 of the Sherman Act, 88 Stat. 1708, 15 U.S.C. § 2. *United States v. American Telephone and Telegraph Company*, Civil No. 74-1698 (D.D.C., filed November 20, 1974) (the "*AT&T*" case). The District Court had jurisdiction of that case pursuant to section 4 of the Sherman Act, 62 Stat. 909, 15 U.S.C. § 4, and pursuant to 62 Stat. 931, 28 U.S.C. § 1337.

On January 8, 1982, the Department of Justice and AT&T agreed to settle the *AT&T* case by entry of a voluntary dismissal. At the same time, they filed a stipulation with the United States District Court for the District of New Jersey consenting to the entry of a proposed Modification of a consent judgment in an earlier civil antitrust suit brought by the government against AT&T and its subsidiaries, *United States*

v. Western Electric Company, Civil Action No. 17-49 (D.N.J.) (the "*Western Electric*" case), and moved to transfer that action to the District Court in the District of Columbia. The *Western Electric* case was tranferred to the District of Columbia on January 21, 1982, and consolidated with the suit then pending before the District Court.

Before entering the proposed amendments to the *Western Electric* decree and dismissing the pending suit, the District Court held public comment proceedings — the equivalent of the procedures required by the Tunney Act, 94 Stat. 1157, 15 U.S.C. § 16 — to determine whether the proposed Modification was consistent with the public's interest. The State Appellants filed comments and briefs with the District Court as part of that process addressing, among others, the issues raised by this appeal.

On August 11, 1982, the court below filed an Opinion ruling on the comments submitted. The Opinion rejected State Appellants' argument. The court recommended certain changes to the proposed Modification not directly at issue in State Appellants' appeals. On August 19, 1982, a motion for reconsideration respecting one portion of the District Court's opinion was filed and, on August 23, 1982, it was denied. On August 24, 1982, the Modification, as amended pursuant to the court's recommendations, was entered.[1] On August 26, 1982, and October 14, 1982, the court entered orders admitting the State Appellants[2] and others as intervening parties. Among the rights conferred upon intervenors in that order was the right to appeal the entry of the Modification. (J.A. 193).

The State Appellants timely filed appeals from the entry of the Modification of Final Judgment with the District Court

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[1] Although the Modification requires the parties to formulate and submit the details of a plan of divestiture for District Court approval, it is a final judgment for purposes of appeal. *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) (a decree resolving the issues outstanding between parties except for the formulation of a plan of divestiture constitutes a final judgment for purposes of an Expediting Act appeal).

[2] The District Court has not yet ruled on the application of the Tennessee Public Service Commission to intervene.

as required by Rules 3 and 4 of the Federal Rules of Appellate Procedure. The dates the State Appellants filed notices of appeal are: Arizona, November 5, 1982; Delaware, November 5, 1982; Maryland, October 25, 1982; Missouri, November 5, 1982; New Hampshire, November 5, 1982; North Carolina, November 5, 1982; Tennessee, October 25, 1982; Virginia, November 5, 1982; Wisconsin, November 5, 1982; Alabama Public Service Commission, November 4, 1982; Kentucky Public Service Commission, November 5, 1982; South Dakota Public Utilities Commission, November 4, 1982; Tennessee Public Service Commission, October 25, 1982; Virginia State Corporation Commission, October 25, 1982; Public Service Commission of West Virginia, November 5, 1982; Wisconsin Public Service Commission, October 29, 1982.

On November 5, 1982, the State of Maryland timely moved under the Expediting Act, 88 Stat. 1709, 15 U.S.C. § 29(b), for certification of this case for direct review by this Court.[3] On November 10, 1982, the District Court certified the appeals of the State Appellants and others[4] for direct review by this Court ruling that "such immediate consideration is of general public importance in the administration of justice." (J.A. 204-208).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The text of the following Constitutional and statutory provisions is set out in the Joint Appendix:

U.S. Const. art. I, § 8, cl. 2; art. VI, cl. 2. (J.A. 241).

15 U.S.C. §§ 2, 16, 29(b). (J.A. 242-47).

Alabama Public Service Commission Laws, Ala. Code §§ 37-1-31, 37-1-32, 37-1-40, 37-1-43, 37-1-50, 37-2-5, 37-2-171, 37-2-180 (1975 & Supp. 1981). (J.A. 248-51).

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[3] Similar motions were made by the United States, November 8, 1982; the State of Tennessee and the Tennessee Public Service Commission, November 9, 1982; and the Alabama Public Service Commission, November 9, 1982.

[4] The appeals of the State of Illinois, Tandy Corporation, North American Telephone Association and Jack Faucett Associates, Inc. were also certified.

Ariz Const. art. 15, §§ 2, 3, 4, 5, 6, 7, 9, 12, 13, 14, 15. (J.A. 252-55).

Arizona Corporation Commission Laws, Ariz. Rev. Stat. Ann. §§ 40-201, 40-202, 40-203, 40-204, 40-221, 40-241, 40-250, 40-251, 40-281, 40-284, 40-285, 40-286, 40-301, 40-302, 40-323, 40-328, 40-329, 40-361, 40-362, 40-367, 40-369 (1975 & Supp. 1981). (J.A. 255-69).

Delaware Public Service Commission Laws, Del. Code Ann. tit. 26, §§ 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 163, 164, 165, 166, 901, 902, 903, 904, 905, 906, 907 (1974 & Supp. 1982). (J.A. 270-82).

Kentucky Public Service Commission Laws, Ky. Rev. Stat. Ann. §§ 278-010, 278.020, 278.040, 278.160, 278.290, 278.300 (1969 & Supp. 1982). (J.A. 270-303).

Maryland Public Service Commission Law, Md. Ann. Code art. 78, §§ 1, 2(o), 3, 24, 27, 28, 56, 59A, 61, 62, 62A, 63, 65, 66, 67, 67E, 68, 69, 69B, 70, 73, 75, 99, 101, 104 (1980 & Supp. 1982). (J.A. 304-23).

Missouri Public Service Commission Law, Mo. Ann. Stat. §§ 386.250, 386.320, 392.200.3, 392.240, 392.250, 392.260, 392.270, 392.300, 392.320.2, 392.340 (Vernon 1952 & Supp. 1982). (J.A. 324-34).

New Hampshire Public Service Commission Laws, N.H. Rev. Stat. Ann. §§ 362:2, 369:1, 369:2, 369:3, 369:4, 369:7, 369:11, 369:12, 369:14, 369:15, 374:1, 374:3, 374:4, 374:5, 374:13, 374:22, 374:28, 374:30, 378:1, 378:3, 378:4, 378:5, 378:6, 378:7 (1966 & Supp. 1981). (J.A. 335-43).

North Carolina Public Utilities Act, N.C. Gen. Stat. §§ 62-2, 62-3, 62-12, 62-20, 62-23, 62-31, 62-32, 62-33, 62-34, 62-35, 62-36, 62-37, 62-38, 62-39, 62-40, 62-41, 62-42, 62-43, 62-44, 62-45, 62-47, 62-48, 62-49, 62-51, 62-60, 62-60.1, 62-61, 62-62, 62-63, 62-64, 62-65, 62-66, 62-67, 62-68, 62-69, 62-70, 62-71, 62-73, 62-76, 62-77, 62-80, 62-90, 62-95, 62-96, 62-110, 62-111, 62-112, 62-113, 62-116, 62-118, 62-119, 62-120, 62-121, 62-122, 62-123, 62-124, 62-130, 62-131,

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South Dakota Public Utilities Commission Laws, S.D. Comp. Laws Ann. §§ 49-1-8, 49-3-1, 49-3-3, 49-3-4, 49-3-10, 49-3-11, 49-8-2, 49-10-1, 49-30-1, 49-31-1, 49-31-2, 49-31-3, 49-31-6, 49-31-7, 49-31-15 (1967 & Supp. 1980). (J.A. 405-09).

Tennessee Public Service Commission Laws, Tenn. Code Ann. §§ 65-4-101, 65-4-104, 65-4-105, 65-4-106, 65-4-107, 65-4-110, 65-4-111, 65-4-112, 65-4-113, 65-4-114, 65-4-115, 65-4-201, 65-4-202, 65-4-203 (1980). (J.A. 410-18).

Va. Const. art. IX, § 2. (J.A. 419).

Virginia State Corporation Commission Laws, Va. Code §§ 56-35, 56-56, 56-57, 56-58, 56-67, 56-77, 56-80, 56-265.2, 56-265.3, 56-265.4 (1981 & Supp. 1982). (J.A. 410-23).

West Virginia Public Service Commission Laws, W. Va. Code §§ 24-1-1, 24-1-2, 24-2-1, 24-2-1a, 24-2-2, 24-2-3, 24-2-6, 24-2-7, 24-2-11, 24-2-12, 24-3-1, 24-3-7 (1980 & Supp. 1982). (J.A. 424-39).

Wisconsin Public Service Commission Laws, Wis. Stat. Ann. §§ 184.06, 196.01, 196.02, 196.04, 196.05, 196.09, 196.37, 196.375, 196.38, 196.49, 196.50, 196.52, 196.605, 196.79, 196.80, 196.81 (West 1957 and Supp. 1982). (J.A. 440-69).

STATEMENT OF THE CASE

On January 8, 1982, the United States and AT&T announced the settlement of their legal dispute, which had been in trial for more than a year, *United States v. American Telephone and Telegraph Co.*, Civil Action No. 74-1698 (D.D.C.). The settlement was effected by an agreed dismissal of the *AT&T* case and the submission of a proposed Modification of Final Judgment to replace a consent decree entered in 1956 in *United States v. Western Electric Company, Inc. and Amer-*

ican Telephone and Telegraph Company, Inc., Civil No. 17-49 (D.N.J.). On January 14, 1982, the *Western Electric* case was transferred to the United States District Court for the District of Columbia and assigned to District Judge Harold Greene, who presided over the trial in the *AT&T* case.

The Modification requires AT&T to divest itself of its local telephone companies (referred to as "Bell Operating Companies" or "BOCs"). Although the details of the plan of divestiture have not been finalized, it is clear from the Modification that many of the steps in the contemplated divestiture require the BOCs, all of which are subject to regulation by State public service commissions ("PSCs"), to take actions that are subject to PSC jurisdiction without first obtaining PSC approval or, in some cases, that require the BOCs to violate State law. Specifically, the Modification requires that AT&T take charge of the assets of the BOCs and then transfer to new local telephone companies assets sufficient for them to perform, independently of AT&T, "exchange telecommunications and exchange access functions." Modification ¶ I A(1). (J.A. 174). These transfers are to be effected by the parties without any requirements that PSCs even be consulted, notwithstanding State law that requires PSC *approval*.[5]

The Modification also requires the BOCs to cease performing various services which are currently subject to PSC regulation, such as intrastate interexchange service. Again, the Modification simply ignores State PSC jurisdiction, despite the fact that State law *requires* PSC approval before a regulated utility discontinues any service.[6] Moreover, the

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[5] Ala. Code § 37-1-50 (1975); Ariz. Rev. Stat. Ann. §§ 40-285, 40-367 (1975); Del. Code Ann. tit. 26, § 165 (1974); Ky. Rev. Stat. Ann. §§ 278.010, 278.040, 278.290 (1969) (*See Public Service Commission v. Cities of Southgate, etc., Ky.*, 268 S.W.2d 19 (Ky. 1954)); Md. Ann. Code art. 78, § 24 (1980); Mo. Ann. Stat. § 392.300 (Vernon 1952); N.H. Rev. Stat. Ann. § 374:30 (1966); N.C. Gen. Stat. § 62-111 (1978); S.D. Comp. Laws § 49-31-3 (1980); Tenn. Code Ann. § 65-4-112 (1980); Va. Code §§ 56-35, 56-56, 56-77, 56-80 (1981); W. Va. Code § 24-2-12 (1980); Wis. Stat. Ann. §§ 196.01, 196.81 (1982).

[6] Ala. Code § 37-1-50 (1975); Ariz. Rev. Stat. Ann. §§ 40-281, 40-285, 40-329, 40-361 (1975); Del. Code Ann. tit. 26, § 165 (1974); Ky. Rev. Stat.

Modification requires the new local telephone companies to restrict their future business activities by denying them the right to "provide any other product or service between intrastate exchange areas to be approved by the court [called "Local Access Transport Areas" or "LATAs"], except exchange telecommunications and exchange access service, that is not a natural monopoly service actually regulated by tariff." Modification ¶ II D(3). (J.A. 176). Finally, the Modification purports to authorize "competitive" firms to provide *intrastate* interexchange service, notwithstanding the judgment of State legislatures that PSCs may require regulated companies to provide these services.[7] In sum, the Modification disregards State law directing PSCs to regulate utilities to assure consumers adequate, economic, and universal public telephone service.[8]

Prior to acceptance of the Modification, the District Court permitted all interested persons to submit comments discussing whether the Modification was in the public interest. Following the initial round of comments, the court invited more detailed briefs from the public addressing particular issues, including the impact of this Modification on State regulation. In written submissions to the court on April 20, 1982, and June 14, 1982, and in oral argument before the court on June 29, 1982, the State Appellants argued that the

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Ann. §§ 278.010, 278.040 (1969) (*See Public Service Commission v. Cities of Southgate, etc., Ky.*, 268 S.W.2d 19 (Ky. 1954)); Md. Ann. Code art. 78, §§ 24, 75 (1980); Mo. Ann. Stat. § 392.300 (Vernon 1952); N. H. Rev. Stat. Ann. §§ 374:28, 374:30 (1966); N.C. Gen. Stat. § 62-118 (1978); S.D. Comp. Laws Ann. §§ 49-3-10, 49-31-3 (1980); Tenn. Code Ann. § 65-4-112 (1980); Va. Code § 56-35 (1981) (*See Virginia Electric & Power Co. v. State Corporation Commission*, 219 Va. 894, 252 S.E.2d 333 (1979)); W. Va. Code §§ 24-3-1, 24-3-7 (1980); Wis. Stat. Ann. §196.81 (1982).

[7] Ariz. Rev. Stat. Ann. §§ 40-329, 40-361 (1975); Del. Code Ann. tit. 26, §§ 131, 132, 135, 136 (1974); Ky. Rev. Stat. Ann. §§ 278.010, 278.040 (1969); Md. Ann. Code art. 78, §§ 28(c), 59A, 73 (1980); Mo. Ann. Stat. §§ 392.240, 392.250 (Vernon 1952 & Supp. 1982); N.H. Rev. Stat. Ann. § 374:1 (1966); N.C. Gen. Stat. §§ 62-42, 62-113, 62-138 (1978); S.D. Comp. Laws Ann. §§ 49-3-10, 49-31-7, 49-31-15 (1980); Tenn. Code Ann. §§ 65-4-113, 65-4-114 (1980); Va. Code § 56-265.4 (1981); W. Va. Code §§ 24-2-1, 24-2-2 (1980); Wis. Stat. Ann. § 196.04 (1957).

[8] *See, e.g.*, N.C. Gen. Stat. § 62-2 (1978); W. Va. Code § 24-1-1 (1980).

Modification impermissibly seeks to supersede State public utility laws not preempted by virtue of the State Action Doctrine. *Parker v. Brown*, 317 U.S. 341 (1943).

On August 11, 1982, the court issued an opinion which, in dealing with the State Action issue raised in the comment period, rejected this argument. (J.A. 42-47). The court held that the protection afforded State regulation by the State Action Doctrine does not apply where "there is a conflict between a necessary antitrust remedy in a case where the federal antitrust court has jurisdiction and in which the antitrust laws have been validly applied as a substantive matter and state regulatory schemes which would prevent such a remedy from being implemented." (J.A. 46). In so holding, the District Court found that the State Action Doctrine is applicable only in cases of conflict between explicit state statutory policy and "inchoate, general antitrust policy." (J.A. 46).

THE QUESTION IS SUBSTANTIAL

The question of whether a federal court, acting pursuant to jurisdiction conferred by the Sherman Act, may enter a decree that commands parties to ignore or violate valid State law is indeed substantial. At issue is the manner in which telecommunications services are to be provided to a tremendous portion of the American population and the ability of State public service commissions to act, in a manner chosen by their State legislatures, to ensure that their citizens are provided adequate, economic and universal telephone service.

This case also presents important questions of State-Federal relationships that go beyond the boundaries of this suit. The holding of the District Court, which permits a federal court acting under the Sherman Act to require persons to take actions that contravene expressly articulated State law, establishes a precedent that derogates the ability of States to regulate business activity generally. At issue in this case is whether the antitrust enforcement policy of the federal government may, in the name of enhancing competition,

compromise the traditional regulatory role performed by States by preempting State regulation in spite of the protection the Sherman Act affords such regulation.

The Modification approved by the Court below effectively preempts State law to accommodate a remedy desired by the Department of Justice and AT&T. In so doing, the consent decree in this case purports to extend the reach of the Sherman Act far beyond that which Congress intended. In enacting the Sherman Act, Congress preserved the ability of States to regulate economic activity, even where competition may be impaired. *Parker v. Brown*, 317 U.S. 341 (1943). Thus, Congress did not exercise its broad Commerce Clause powers fully, choosing instead to prohibit only restraints of trade by private persons "and not to prohibit a State from imposing a restraint as an act of government." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788 (1975).

In *Parker v. Brown*, 317 U.S. 341 (1943), this Court held that a California statute authorizing a State agency to regulate and set rates for that State's raisin industry did not conflict with federal antitrust law. The California regulatory program was immune from the operation of the Sherman Act because Congress did not intend that Act's strictures to apply to State actions:

> [California's regulatory program] derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.
>
> The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.

* * * * *

> There is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only "business combinations".

317 U.S. at 350-351. The Court concluded that in light of its "words and history, it [the Sherman Act] must be taken to be a prohibition of individual and not state action." 317 U.S. at 352.

Recent decisions of this Court have affirmed the vitality of the State Action Doctrine articulated in *Parker*. *See Community Communications Co. v. City of Boulder*, 102 S.Ct. 835 (1982); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976). In *Midcal Aluminum*, this Court summarized the test for determining when the State Action Doctrine is applicable: first, the State policy requiring regulation must be "clearly articulated and affirmatively expressed" and second, the State must "actively" supervise the regulated activity.[9] 445 U.S. at 105. When these criteria are met, the State regulation is "outside the reach of the antitrust laws under the 'state action' exemption." *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. at 109.

Supplanting competition with regulation is the basic concept underlying the existence of State public service commissions. Indeed, State public service commission laws are archetypical examples of clear State policy decisions to supplant competition with active State regulation. These laws are the result of State legislative recognition that public utility service cannot be provided adequately or economically in a competitive market. They have been adopted to protect the public from monopoly abuse, and they assure universal access to vital utility services.

In recognition of the importance of effective regulation of

[9] The scope of the State Action exemption as it applies to any particular State regulatory scheme can be determined only after careful examination of the command of that State's legislature. *See, e.g., Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976).

utility service, States have vested their public service commissions with plenary regulatory powers. For example, Maryland's Public Service Commission is charged with the duty to supervise and regulate all public service companies[10] "to assure their operation in the interest of the public and to promote adequate, economical, and efficient delivery of utility services in the State . . . ." Md. Ann. Code art. 78, § 56 (1980). To this end, the Maryland General Assembly has vested the Commission with the strongest mandate possible:

> The jurisdiction and powers of the Public Service Commission shall extend to all public service companies . . . engaged in or operating a utility business in this State . . . to the full extent permitted by the Constitution and laws of the United States. The powers of the Commission shall be liberally construed; and the Commission shall have the powers specifically conferred by this article and by any other law, and also all implied and incidental powers necessary and proper to carry out effectually the provisions of this article.

Md. Ann. Code art. 78, § 1 (1980).

Public service companies must seek authorization from the Public Service Commission prior to transferring, abandoning or discontinuing any public service. Md. Ann. Code art. 78, § 24 (b)(1), (3) (1980). The Commission is empowered to prescribe standards of "safe, adequate, reasonable and proper service" for any regulated company and is further empowered to enforce those standards. Md. Ann. Code art. 78, § 73 (1980). Moreover, the Commission may require regulated companies to submit plans for provision of future services and is empowered to order any revisions to those plans to effectuate its mandate. Md. Ann. Code art. 78, § 59A (1980). Finally, the Commission is empowered to determine just and reasonable rates which may be charged by public service companies for the services they are authorized to provide. Md. Ann. Code art. 78, § 68 (1980).

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[10] Telephone companies are included in the definition of "public service companies." Md. Ann. Code. art. 78, § 2(o).

Through statutory and Constitutional provisions similar to, or in many cases more specific than, those of the Maryland Public Service Commission Law, other states have affirmatively articulated their intention to regulate public utilities with specific commands.[11] For example, with regard to asset transfers, West Virginia's Public Service Commission statute states in very clear terms, "Unless the consent and approval of the public service commission of West Virginia is first obtained . . . no public utility subject to the provisions of this chapter [which includes telephone companies] . . . may assign, transfer, lease, sell or otherwise dispose of its franchises, licenses, permits, plants, equipment, business or other property or any part thereof . . . ." W. Va. Code § 24-2-12(c) (1980). Similarly, North Carolina's PSC statute clearly empowers that State's commission to require regulated companies to provide any services it deems necessary to serve the public's convenience and necessity, to remedy inadequate service or to improve facilities. N.C. Gen. Stat. § 62-42 (1978).

These statutes satisfy the State Action test. The State Appellants' public service commission laws clearly articulate state policies to replace competition with State regulation, and the State PSCs actively supervise public utility companies. Consequently, State public service commission laws are beyond the jurisdiction of the Sherman Act. *Orrin W. Fox Co.*, 439 U.S. at 109. The entry of the Modification by the District Court on August 24, 1982, therefore, raises the very important question of whether a Sherman Act decree may disregard these valid state PSC laws.

The implications of this case for State public utility regulation are profound. The restructuring of the BOCs required by the plan of divestiture will fundamentally impair State regulation of local telephone companies. Essential to the control of local telephone rates is the power of State PSCs to control the transfer of assets by regulated telephone companies and to determine the types of telephone service they provide. Without these controls, PSC authority to set rates is severely compromised. Yet, the modification usurps

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[11] See footnotes 5, 6, and 7 *supra*.

State control over both transfers of assets and determination of services. After divestiture, a new provider of local telephone service may not be sufficiently secure financially to assure economic service, possess sufficient assets to provide quality universal service, or be able to provide that range of services necessary to ensure consumers proper telephone service.

The Modification will result in judicial involvement in intrastate telephone regulation for many years to come. Under its terms, exchange areas, called LATAs (Local Access Transport Areas) must be established. Modification ¶ IV G (J.A. at 178-79). Each LATA boundary determines the area of operation for State-regulated local telephone companies. The Modification requires that the LATA boundaries be drawn according to demographic and political lines. As demographic patterns change, new boundaries will be required. The Modification contemplates District Court approval of any such changes. Consequently, the court below will be engaged in intrastate telephone regulation far into the future.

The implications of the rule established by the District Court extend beyond the borders of this case. Under the aegis of the Sherman Act, the entire body of State law regulating trade is subject to preemption by affirmative injunction imposed by federal consent decree. If entered in a private case, not even the right to object afforded by the Tunney Act would have to be given the State whose laws were effectively being repealed. Congress clearly did not intend that the Sherman Act would be used by federal courts to preempt State regulatory policies.[12] As this Court explained in *Parker*, "an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. at 351. Yet, that is precisely what the rule in this case would do.

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[12] *United States v. Terminal Railroad Ass'n*, 236 U.S. 194 (1915). This Court would not permit a court acting with Sherman Act jurisdiction to correct an abuse of one statute by directing violation of another. *United States v. National Lead Co.*, 332 U.S. 319, 334-35 (1947) (court is under an obligation to accommodate valid laws in framing a decree).

CONCLUSION

For the above reasons, the Court should note probable jurisdiction of this appeal.

DATED: December 8, 1982

Respectfully submitted,

STEPHEN H. SACHS
Attorney General of Maryland

CHARLES O. MONK, II
Assistant Attorney General and
Chief, Antitrust Division
Counsel of Record

ALAN M. BARR
Assistant Attorney General
The Munsey Building
7 North Calvert Street, 3rd Flr.
Baltimore, Maryland 21202
(301) 576-6470

Counsel for the State of Maryland
(Additional counsel listed inside
front cover)

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No.

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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF MARYLAND, *et al.*,
Appellants,

v.

UNITED STATES OF AMERICA, WESTERN ELECTRIC COMPANY, INC. AND AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX TO JURISDICTIONAL STATEMENTS OF APPELLANTS

STEPHEN H. SACHS
Attorney General of Maryland,

CHARLES O. MONK, II
Assistant Attorney General and
Chief, Antitrust Division
Counsel of Record

ALAN M. BARR
Assistant Attorney General
The Munsey Building
7 North Calvert Street, 3rd Flr.
Baltimore, Maryland 21202
(301) 576-6470

Attorneys for the State of Maryland

December 8, 1982

ADDITIONAL COUNSEL

MARK D. WILKERSON
Special Assistant Attorney General
EUELL SCREWS
Assistant Attorney General
State Office Building
339 Dexter Avenue
P.O. Box 991
Montgomery, Alabama 36102
(205) 832-6282
Attorney for the Alabama Public Service Commission

ROBERT K. CORBIN
Attorney General
ANTHONY B. CHING
Solicitor General
1275 Washington Street
Phoenix, Arizona 85007
(602) 255-3333
Attorneys for the State of Arizona

RICHARD S. GEBELEIN
Attorney General
VINCENT AMBERLY
Deputy Attorney General
820 North French Street
Wilmington, Delaware 19801
(302) 571-2514
Attorneys for the State of Delaware

TYRONE C. FAHNER
Attorney General
FREDRIC D. TANNENBAUM
Assistant Attorney General
Public Utilities Division
188 West Randolph Street
Suite 2315
Chicago, Illinois 60601
(312) 793-7780
Attorneys for the State of Illinois

WILLIAM M. SAWYER
ELLYN ELISE CRUTCHER
PAUL M. CUPP
JOHN H. HUGHES
730 Schenkel Lane
Frankfort, Kentucky 40602
(502) 564-7347
Attorneys for the Kentucky Public Service Commission

JOHN D. ASHCROFT
Attorney General
EDWARD D. ROBERTSON, JR.
Deputy Attorney General
P.O. Box 899
Jefferson City, Missouri 65102
(314) 751-3321
Attorneys for the State of Missouri

GREGORY H. SMITH
Attorney General
EDWARD E. LAWSON
Antitrust Counsel
State House Annex
Concord, New Hampshire 03301
(603) 271-3640
Attorneys for the State of
New Hampshire

H. A. COLE, JR.
Special Deputy Attorney
General
Chief, Antitrust Division
FRED R. GAMIN
Assistant Attorney General
North Carolina Department of
Justice
P.O. Box 629
Raleigh, North Carolina 27602
Attorneys for the State of
North Carolina

JAMES M. LYONS
FREDERICK J. BAUMANN
1600 Broadway, Suite 2400
Denver, Colorado 80202
(303) 861-2600
MARCUS W. SISK, JR.
Sisk, Foley, Hultin & Driver
2501 M. Street N.W.
Washington, D.C. 20037
Attorneys for South Dakota
Public Utilities Commission

WILLIAM M. LEECH, JR.
Attorney General
WILLIAM J. HAYNES, JR.
Deputy Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-2672
Attorneys for the State of
Tennessee

HENRY M. WALKER
General Counsel
State of Tennessee
Cordell Hull Building
Nashville, Tennessee 37219
(615) 741-3191
Attorney for the Tennessee
Public Service Commission

GERALD L. BALILES
Attorney General
WILLIAM G. BROADDUS
Chief Deputy Attorney
General
ELIZABETH B. LACY
Deputy Attorney General
ANTHONY GAMBARDELLA
Assistant Attorney General
101 8th Street
Richmond, Virginia 23219
(804) 786-4076
Attorneys for the Commonwealth
of Virginia

RUSSELL W. CUNNINGHAM
Associate General Counsel
SHERRY H. BRIDEWELL
Attorney
P.O. Box 1197
Richmond, Virginia 23209
(804) 786-8671
Attorneys for the Virginia
State Corporation Commission

ROBERT RODECKER
General Counsel
JOEL B. SHIFMAN
Telecommunications Attorney
Legal Division
State Capital
Charieston, West Virginia 25305
(304) 348-3890
Counsel for the Public Service
Commission of West Virginia

BRONSON C. LAFOLLETTE
Attorney General
MICHAEL L. ZALESKI
Assistant Attorney General
KEVIN J. O'CONNOR
Assistant Attorney General
Antitrust and Criminal
Litigation Unit
P.O. Box 7857
Madison, Wisconsin 53707
(608) 266-3016
Attorneys for the State of
Wisconsin

PHILIP J. MAUSE
Kadison, Pfaelzer, Woodard,
Quinn & Rossi
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 452-8300
Attorney for the Wisconsin
Public Service Commission

ALBERT H. KRAMER
Cohn & Marks
1333 New Hampshire
Avenue, N.W.
Washington, D.C. 20036
Attorneys for North American
Telephone Association

MALCOLM R. PFUNDER
Hamel, Park, McCabe &
Saunders
888 Sixteenth Street,
Northwest
Washington, D.C. 20006
(202) 835-8062
Attorney for Tandy Corporation

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OPINION DENYING APPROVAL OF PROPOSED MODIFICATION OF FINAL JUDGMENT AND RECOMMENDING CHANGES

(Filed: August 11, 1982)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INC.; AND BELL TELEPHONE LABORATORIES, INC., Defendants.	Civil Action No. 74-1698
UNITED STATES OF AMERICA, Plaintiff, v. WESTERN ELECTRIC COMPANY, INC., AND AMERICAN TELEPHONE AND TELEGRAPH COMPANY, Defendants.	Civil Action No. 82-0192
UNITED STATES OF AMERICA, Plaintiff, v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al., Defendants.	Misc. No. 82-0025 (PI)

OPINION

These actions are before the Court[1] for a determination whether a consent decree proposed by the parties is in the "public interest"[2] and should therefore be entered as the Court's judgment. Over six hundred comments from interested persons, many of them objecting to various aspects of the proposal, have been received, and the Court has considered briefs submitted by the parties and others, and it has heard extensive oral argument. This opinion discusses the principal questions raised by these interested persons, and it embodies the Court's decision on the appropriateness of the proposed decree under the Tunney Act's public interest standard.

The opinion is divided into twelve parts. Part I relates the history of the litigation and the terms of the proposed decree. The next two sections contain analyses of two underlying legal issues — the standard of review to be applied by the Court under the Tunney Act (Part II) and the relationship between the decree and state regulation (Part III). The following section (Part IV) considers the question whether the divestiture of the local Operating Companies is in the public interest. Two sections discuss the removal of restric-

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[1] A number of prior opinions of this Court deal with earlier phases of these cases. The principal opinions in that category are reported at 461 F. Supp. 1314 (D.D.C. 1978) and 524 F. Supp. 1336 (D.D.C. 1981). Other opinions and memoranda may be found at 1982-1 Trade Cas. ¶ 64,623 (D.D.C. 1982); 1982-1 Trade Cas. ¶ 64,522 (D.D.C. 1982); 1982-1 Trade Cas. ¶ 64,521 (D.D.C. 1982); 1982-1 Trade Cas. ¶ 64,476 (D.D.C. 1982); 1982-1 Trade Cas. ¶ 64,465 (D.D.C. 1982); 524 F. Supp. 1381 (D.D.C. 1981); 524 F. Supp. 1331 (D.D.C. 1981); 1981-2 Trade Cas. ¶ 64,203 (D.D.C. 1981); 516 F. Supp. 1237 (D.D.C. 1981); 1981-1 Trade Cas. ¶ 63,987 (D.D.C. 1981); 1981-1 Trade Cas. ¶ 63,938 (D.D.C. 1981); 1980–81 Trade Cas. ¶ 63,711 (D.D.C. 1981); 1980–81 Trade Cas. ¶ 63,705 (D.D.C. 1981); 1980–81 Trade Cas. ¶ 63,696 (D.D.C. 1980); 88 F.R.D. 47 (D.D.C. 1980); 498 F. Supp. 353 (D.D.C. 1980); 86 F.R.D. 603 (D.D.C. 1980); 1980-1 Trade Cas. ¶ 63,244 (D.D.C. 1980); 84 F.R.D. 350 (D.D.C. 1979); 83 F.R.D. 323 (D.D.C. 1979); and 86 F.R.D. 603 (D.D.C. 1979).

[2] Antitrust Procedures and Penalties Act, 15 U.S.C. §§ 16(b)–(h) (hereinafter referred to as the Tunney Act). See Part I(C) and II *infra*. The statute was sponsored by Senator Tunney of California.

tions from AT&T — Section V as a general matter, and Section VI in the context of the provision of information and of electronic publishing services. The next two sections directly relate to the Operating Companies: Section VII considers whether the proposed limitations on Operating Company activities are in the public interest and Section VIII whether the decree makes adequate provision for access by intercity carriers to Operating Company networks. Part IX discusses the issues arising from the division of assets between AT&T and the Operating Companies; Part X considers special issues and provisions; and Part XI deals with problems of implementation and enforcement. Part XII contains the Court's summary and conclusion.

I
PRELIMINARY CONSIDERATIONS

A. History of the Litigation

On January 14, 1949, the government filed an action in the District Court for the District of New Jersey against the Western Electric Company, Inc.[3] and the American Telephone and Telegraph Company, Inc. (Civil Action No. 17-49).[4] The complaint alleged that the defendants had monopolized and conspired to restrain trade in the manufacture, distribution, sale, and installation of telephones, telephone apparatus, equipment, materials, and supplies, in violation of sections 1, 2, and 3 of the Sherman Act, 15 U.S.C. §§ 1, 2, and 3.[5] The relief sought included the divestiture by AT&T of its stock ownership in Western Electric; termination of exclusive

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[3] Western Electric is the wholly owned subsidiary of AT&T that manufactures telecommunications equipment for AT&T's Long Lines Department and the Operating Companies. In addition, Western Electric provides telecommunications equipment and services to government agencies and, to a limited extent, the independent telephone companies.

[4] After the transfer of the action to this Court (see pp. 17–18 *infra*) it was docketed here as Civil Action No. 82-0192. The 1949 lawsuit will generally be referred to herein as the "*Western Electric* action."

[5] The action thus focused on the practices of defendants with respect to the telecommunications equipment industry.

relationships between AT&T and Western Electric; divestiture by Western Electric of its fifty percent interest in Bell Telephone Laboratories;[6] separation of telephone manufacturing from the provision of telephone service; and the compulsory licensing of patents owned by AT&T on a nondiscriminatory basis.

The court record reveals little activity in the case between the date of the filing of the complaint in 1949 and the entry of a consent decree in 1956. Except for the notation that an answer was filed in April, 1949, there are no record entries until the Fall of 1951 when the government filed and the court ordered compliance with several discovery requests. Following the discovery order, there is another two-year gap, and it is not until April 27, 1953, that another record entry is found. This entry indicates that defendants were given two additional months to complete their compliance with the government's 1951 discovery requests. The next reference is to the transcript of a hearing held on January 24, 1956, during which the consent decree was approved as being in the public interest. See pp. 7-8 *infra*.

The gaps in the court record are partly filled by a report of a committee of the United States House of Representatives[7] which conducted an intensive investigation of the circumstances surrounding the entry of the consent decree. Report of the Antitrust Subcommittee of the House Committee on the Judiciary on the Consent Decree Program of the Department of Justice, 86th Cong., 1st Sess., January 30, 1959 (Committee Print) [hereinafter Subcommittee Report]. That report reveals that the parties were quite active between the time of the filing of the government's discovery requests in 1951 and the signing of the consent decree in 1956.

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[6] Bell Telephone Laboratories, AT&T's telecommunications research and development facility, is a jointly owned subsidiary in which AT&T and Western Electric each own 50 percent of the stock.

[7] In a Tunney Act proceeding the Court is not limited by the rules of evidence but may take into account facts and other considerations from many different sources. See, *e.g.*, 15 U.S.C. § 16(f).

As early as February 28, 1952, the president of Bell Laboratories, Dr. M. J. Kelly, met with Secretary of Defense Robert A. Lovett and other members of the Department of Defense to enlist their help in persuading the Justice Department to suspend prosecution of the action[8] until the end of the Korean War,[9] a suspension the Attorney General refused to grant.[10]

AT&T continued its attempts to end the litigation as soon as the Eisenhower Administration took office. Its executives and lawyers met with officials of the Departments of Defense and Justice throughout the first six months of 1953. Subcommittee Report at 51-52. These efforts culminated in a meeting on June 27, 1953, during a judicial conference held at White Sulphur Springs, West Virginia, between T. B. Price, AT&T's general counsel, and Attorney General Herbert Brownell. According to a memorandum prepared by Price following this meeting, Attorney General Brownell said that he believed that "a way ought to be found to get rid of the case," and that AT&T "could readily find practices that [they] might agree to have enjoined with no real injury to [their] business." Memorandum of T. B. Price (March 3, 1954) *reprinted in* Subcommittee Report at 53-54.[11]

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[8] That same day, counsel for AT&T met with Attorney General J. Howard McGrath to make the same request, contending that the antitrust litigation was forcing key Bell Laboratories and Western Electric executives involved in important national defense projects to divert their attention from that work to preparations for trial. Subcommittee Report at 45-46.

[9] Secretary of Defense Lovett requested the postponement in a letter to the Attorney General dated March 20, 1952. As stated by the Committee,

> [i]ndefinite postponement was requested by the Defense Department despite the fact that neither Mr. Lovett . . . nor anyone else in the Department had made an independent investigation to determine whether trial of the suit would actually impede the mobilization effort or whether Bell System personnel working on defense matters would actually be needed for preparation of trial of the case.

Subcommittee Report at 47.

[10] The Defense Department continued to advocate this position for the remainder of 1952. Subcommittee Report at 51.

[11] In reviewing Price's memorandum and other information concerning

Shortly after this meeting, AT&T again urged the Defense Department "to intercede with the Justice Department to have the case settled on a basis that would not require divorcement of Western." Subcommittee Report at 55. To that end, Secretary of Defense Charles E. Wilson had a letter hand-carried to Attorney General Brownell urging him to end the litigation without divesting Western Electric. The rationale stated for this position was that the severance of Western Electric would "effectively disintegrate the coordinated organization which is fundamental to the successful carrying forward of these critical defense projects," and would be contrary to the vital interests of the Nation." Subcommittee Report at 56. The Wilson letter was actually prepared by AT&T.[12]

Periodic negotiations between AT&T and the government continued through 1954 and 1955, and by early December, 1955, the government and AT&T had reached an agreement.[13]

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the meeting, the Antitrust Subcommittee characterized the government's position as follows:

> There can be little doubt that by his statements to Mr. Price at the White Sulphur Springs meeting, Attorney General Brownell manifested a willingness to have the Justice Department consider a token settlement and forego a decree consistent with the public interest — an attitude denoting partiality toward the defendants incompatible with the duties of his public office.

Subcommittee Report at 55.

[12] During the summer of 1953, the Defense Department asked AT&T to prepare a memorandum explaining why that department should be interested in the termination of the antitrust litigation. AT&T obliged, and in early July, it provided the Defense Department with a memorandum which urged settlement of the suit without the divestiture of Western Electric. The memorandum was drafted in such a way as to make it appear that the Defense Department rather than AT&T has prepared it and, with two relatively minor exceptions, a letter identical to the memorandum was sent out the next week to the Attorney General over the signature of Secretary of Defense Wilson. Subcommittee Report at 55-56.

[13] The Subcommittee described in some detail how it uncovered evidence of the negotiating process between AT&T, the Department of Defense, and the Department of Justice. It appears that, as part of an attempt to investigate the Justice Department's policies and practices regarding antitrust consent decrees, the Subcommittee requested the Attorney

The consent decree which was the product of this process included neither the divestiture of Western Electric[14] nor any of the other structural relief originally requested by the government. Instead, an injunction was issued which precluded AT&T from engaging in any business other than the provision of common carrier communications services; precluded Western Electric from manufacturing equipment other than that used by the Bell System; and required the defendants to license their patents to all applicants upon the payment of appropriate royalties.

Despite the substantial differences between the structural relief requested in the government's 1949 complaint and the relief actually provided by the proposed decree, the District

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General make available the files relating to the negotiation and signing of the Western Electric consent decree. Subcommittee Report at X-XI. The Department refused to produce the files, and it also declined to supply answers to specific questions. According to the Subcommittee (Report at XIII), "[t]he extent to which the Department of Justice went to withhold information from the committee in this investigation is unparalleled in the committee's experience." In its view, the Department's reluctance to provide information "resulted from a desire to cover up those facts which the Department considered to be embarrassing." Subcommittee Report at XIII, 42.

Because of the Department's failure to cooperate, the subcommittee acquired the necessary information from "correspondence, memorandums [sic], and other files from AT&T, Western Electric Co., the Department of Defense, and the Federal Communications Commission." Subcommittee Report at XIV. Moreover, with regard to the information provided by the Defense Department, the subcommittee criticized that agency for providing the very same material to AT&T, even though it contained internal memoranda and correspondence between the Secretary of Defense and the Attorney General. Indeed, it appears that the Defense Department gave AT&T all of this material the day after AT&T made an oral request for the documents. Subcommittee Report at 43.

[14] The Justice Department contacted the Federal Communications Commission to determine the Commission's position on the issue of the divestiture of Western Electric, advising AT&T that it was doing so. AT&T immediately contacted each FCC Commissioner individually to convey the Bell System's position on the issue. Subcommittee Report at 71-73. Ultimately, the Commission informed the Justice Department that it did not regard the divestiture of Western Electric as essential.

Court for the District of New Jersey accepted the proposal on January 24, 1956, after a brief hearing, stating:[15]

> I feel that I can unhesitatingly accept the recommendation of the Attorney General, that this judgment is in the public interest, and that it is a satisfactory adjustment of this very, very vexatious problem; and I am therefore happy to go along with the recommendation made by the Attorney General and shall forthwith sign this judgment.

After the decree was approved, no major developments occurred in the case for the next several years. Until 1981, the entries in the court record[16] concern primarily the patent licensing provisions.[17]

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[15] *United States* v. *Western Electric Co.*, Civil Action No. 17-49, C.A. 82-0192, Transcript, January 24, 1956, at 5. The transcript of the hearing at which the decree was approved is six pages in length. The only substantive question the Court asked was whether the defendants would be required to provide patent licensees with "a general exposition of the know-how" in addition to providing them with manufacturing drawings, blueprints, and specifications. The government responded in the affirmative. This one assurance, however, appears to have been directly contrary to AT&T's interpretation of their obligation under the decree. During the House Subcommittee's hearings, Chairman Emanuel Celler criticized AT&T's counsel for failing to correct the court's misimpression, stating "[b]y your silence, it strikes me that there was something very much akin to deception on the court, because the court must have had an erroneous impression as to what the decree implied and he signed that decree." Hearings at 2258, *reprinted in* Subcommittee Report at 95-96.

[16] The only exception prior to 1980 is a dispute that occurred in the late 1960s when a private communications system carrier sought leave to intervene as a party plaintiff to challenge New Jersey Bell's offering of what the proposed intervenor characterized as a private communication system to hospitals in violation of the decree. The District Court denied the motion to intervene (*United States* v. *Western Electric*, C.A. No. 17-49, C.A. No. 82-0192, Order, February 26, 1968) and the Supreme Court affirmed (*Clark Walter & Sons, Inc.* v. *United States*, 392 U.S. 659 (1968).

[17] However, there was significant activity early in 1981. On May 2, 1980, the Federal Communications Commission had issued its so-called *Computer II* decision. *Second Computer Inquiry*, 77 F.C.C2d 384 (1980), *on reconsideration*, 84 F.C.C.2d 50 (1980), *on further reconsideration*, 88 F.C.C.2d 512 (1981), *appeal pending sub nom. Computer & Communications Industry Ass'n.* v. *FCC, et al.*, No. 80-1471 (and Consolidated Cases). In

This was the status of the *Western Electric* suit when the government filed a separate antitrust action on November 20, 1974, in this Court against AT&T, Western Electric, and Bell Telephone Laboratories, Inc. (Civil Action No. 74-1698).[18] The complaint in the new action alleged monopolization by the defendants with respect to a broad variety of telecommunications services and equipment in violation of section 2 of the Sherman Act. In this lawsuit, the government initially sought the divestiture from AT&T of the Bell Operating

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that decision, the FCC in essence modified the interstate telecommunications regulatory structure in three ways: first, it distinguished between basic transmission services traditionally provided by common carriers and enhanced network services such as those used for computer data processing; second, it found that enhanced services and customer premises equipment should not be regulated as common carrier offerings; and third, it concluded that AT&T should be allowed under the Communications Act to offer such services and such equipment but only through a fully separate subsidiary. The Computer and Communications Industry Association and others have appealed the *Computer II* decision to the Court of Appeals for this Circuit, and that appeal is still pending.

In the wake of the FCC's decision, AT&T and Western Electric on March 4, 1981, filed a "Motion for Construction" of the consent decree in the *Western Electric* case with the District Court in New Jersey requesting a ruling that the decree would not bar AT&T from furnishing the services authorized by *Computer II*. The motion was opposed by the government, but on September 4, 1981, the Court granted AT&T's request. *United States* v. *Western Electric Co.*, 1981-2 Trade Cases ¶ 64,275 (D.N.J. 1981). The government initially took an appeal to the Court of Appeals for the Third Circuit. On January 8, 1982, contemporaneously with the proposed settlement of these cases, the government and AT&T filed a joint motion to dismiss the appeal and to vacate as moot the District Court's order. The Third Circuit granted the motion on February 2, 1982, and on March 12, 1982, the District Court vacated its order. *United States* v. *Western Electric*, C.A. No. 17-49, C.A. No. 82-0192, Order, March 25, 1982.

[18] The government has indicated that it brought the 1974 suit because in its judgment the 1956 consent decree was not adequate to prevent activities that unreasonably restrained competition in telecommunications equipment markets, and did not protect against antitrust violations in the intercity telecommunications field. Competitive Impact Statement at 5 filed by the Department of Justice February 10, 1982. This Court has held that the 1956 decree did not bar the filing of the 1974 action under the doctrine of *res judicata*. *United States* v. *AT&T*, *supra*, 524 F. Supp. at 1374. The 1974 lawsuit will generally be referred to herein as the "*AT&T* action."

Companies (hereinafter generally referred to as Operating Companies or BOCs)[19] as well as the divestiture and dissolution of Western Electric. While the action was pending, the government changed its relief requests several times asking, at various times or in various alternatives, for the divestiture from AT&T of Western Electric and portions of the Bell Laboratories.[20]

Pretrial discovery began shortly after the defendants filed their answer in February 1975, but during the next three-and-one-half years, that discovery was effectively halted for over thirty months.[21] On February 7, 1978, the Court referred the case to the Magistrate for preparation of a discovery schedule. Pursuant to that authority, the Magistrate issued two orders on April 27, 1978, but attempts at discovery led to various disagreements, and by the Summer of 1978, very little progress had been made.

On September 11, 1978, the Court issued an opinion which disposed of all then outstanding legal issues[22] and laid out the

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[19] The twenty-two Bell Operating Companies, most of which are wholly owned by AT&T, provide the means by which local telephone service is furnished. Bell customers presently also gain access to the network for both local and long distance telecommunications services through the Operating Companies. These Operating Companies are regulated by the various state public utility commissions. They may encompass several states, a single state, or only a single metropolitan area.

[20] The divestiture of all or at least some of the Operating Companies remained one of the government's principal alternative relief requests. See Part IV *infra*.

[21] Discovery was first stayed for almost twenty-two months while the Court resolved certain jurisdictional issues (Pretrial Order No. 1) and then again, this time by the Court of Appeals, while defendants appealed and then sought certiorari from an order this Court had issued on November 24, 1976.

[22] Three major legal issues were addressed, as follows: (1) whether the Court had jurisdiction over the action in light of the federal and state regulatory scheme; (2) whether all of the departments and agencies of the United States constituted the party plaintiff in this suit for purposes of discovery; and (3) whether the government could secure documents obtained in private antitrust suits against the defendants. Defendants unsuccessfully sought a writ of mandamus from the Court of Appeals and a writ of certiorari from the Supreme Court with respect to portions of the order.

future course of the pretrial proceedings. See *United States* v. *AT&T*, *supra*, 461 F. Supp. 1314. In brief, the proceedings were designed to coordinate discovery and the definition of issues and move both forward simultaneously and with expedition. To these ends, the parties were directed to file over the following eighteen months four[23] successive Statements of Contentions and Proof which precisely and in detail defined their legal and factual contentions.[24] Each Statement was to be more specific and more focused than the last, and discovery at each stage was to be limited to the issues raised in the most recent Statements.[25]

Upon the completion of this process, and pursuant to a further pretrial order, the parties began a structured stipulation process. This process was designed to produce, and it did produce, stipulations of all uncontested facts and contentions, a catalogue of all contentions that remained in dispute, and the proof (both testimonial and documentary) that would be used to support each contention. As a result of this process, the case was essentially divided into 82 segments or episodes,[26] many of which constituted major antitrust disputes in their own right. These episodes provided the structure for the presentation of evidence at trial.[27]

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[23] Ultimately only three Statements of Contentions and Proof were filed because the fourth Statement became unnecessary.

[24] Plaintiff's final Statement consisted of 1870 pages; defendants' third Statement of 2145 pages.

[25] To oversee discovery disputes, the Court relied upon the United States Magistrate and upon two Special Masters appointed by the Court. In Pretrial Order No. 16, the Court also ordered the Special Masters to supervise the judicial notice procedure established by the Court. The purpose of this procedure was to determine what documents would be admitted into evidence, notwithstanding their appearance as hearsay documents, for the truth of the matters stated therein. See *United States* v. *AT&T*, *supra*, 498 F. Supp. 353. For both discovery and judicial notice disputes, the parties could appeal the rulings of the Magistrate and of the Special Masters to the Court.

[26] The 82 episodes were recorded on over 4,200 computer printout pages. By the time of trial, some episodes and some contentions had been dismissed by the parties.

[27] For a more detailed explanation of this process, see *United States* v. *AT&T*, *supra*, 88 F.R.D. 47.

The trial itself began on January 15, 1981. At the request of the parties, the trial was recessed immediately after the opening statements[28] for a period of six weeks in order to afford an opportunity for a negotiated settlement.[29] When the settlement discussions proved fruitless, the trial resumed on March 4, 1981. The government presented close to one hundred witnesses, many thousands of documents, and additional thousands of stipulations. After the conclusion of the government's case, defendants moved to dismiss the action on a variety of grounds. That motion was denied on September 11, 1981. *United States* v. *AT&T*, *supra*, 524 F. Supp. 1336. Defendants commenced their case-in-chief on August 3, 1981, and during the next five months they presented approximately 250 witnesses[30] and tens of thousands of pages of documents.

Defendants were scheduled to complete the presentation of their evidence on about January 20, 1982, and it was expected that the government's rebuttal evidence would be presented between that date and February 10, 1982, when the trial would have ended. However, early in January, 1982, the Court was advised of the proposed decree described below.

B. The Proposed Decree

On January 8, 1982, the parties to these two actions filed with the District Court for the District of New Jersey a stipulation consenting to the entry by the Court of the

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[28] Under 15 U.S.C. § 16(a), in any civil or criminal antitrust suit brought by the United States, a final judgment or decree to the effect that a defendant has violated the antitrust laws "shall be prima facie evidence against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken."

[29] Initially, only a two-week recess had been sought and granted, but this was subsequently extended to allow the incoming Reagan Administration and the new leadership of the Department of Justice to evaluate the pending settlement proposals. See this Court's Memorandum Orders of January 16 and January 30, 1981.

[30] The trial record in this case contains over 24,000 transcript pages.

"Modification of Final Judgment"[31] filed therewith.[32] On the same day, they attempted to file in this Court a dismissal of the *AT&T* action pursuant to Rule 41(a)(1)(ii), Federal Rules of Civil Procedure. This Court ordered that the dismissal be lodged, not filed,[33] and, in accordance with that order and the provisions of the Tunney Act, the dismissal has not yet been effected. See note 52 *infra*.

In their settlement proposal, the parties proposed that the Court enter the following judgment with respect to both lawsuits.[34]

Section I of the proposed decree would provide for significant structural changes in AT&T. In essence, it would remove from the Bell System the function of supplying local telephone service by requiring AT&T to divest itself of the portions of its twenty-two Operating Companies which perform that function.

The geographic area for which these Operating Companies would provide local telephone service is defined in the proposed decree by a new unit, the "exchange area." According to the Justice Department, an exchange area "will be large

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[31] The parties have designated their agreement as a "Modification of the Final Judgment." However, since the agreement encompasses far more than a modification of the 1956 judgment — and, indeed, as described at pp. 13–17 *infra*, deals primarily with the *AT&T* lawsuit — it would be misleading to refer to the agreement as a modification of the 1956 decree. The agreement will generally be referred to herein as the "proposed decree."

[32] The parties also filed a Memorandum suggesting procedures for evaluating the settlement proposal and a motion to transfer the *Western Electric* action to this Court. In addition, they filed a joint motion to dismiss the appeals pending in the Court of Appeals for the Third Circuit from the District Court's decision concerning the 1956 consent decree. See note 15 *supra*.

[33] Order filed January 8, 1982.

[34] The description of the agreement in this part of the opinion is general in nature, and it takes account neither of various qualifications and exceptions in the agreement itself nor of the possible impact of a plan of reorganization which AT&T will be required to submit later. These, more specific, issues are discussed in Parts IV through XI *infra*.

enough to comprehend contiguous areas having common social and economic characteristics but not so large as to defeat the intent of the decree to separate the provision of intercity services from the provision of local exchange service."[35] Court approval would be required for the inclusion in an exchange area of more than one standard metropolitan area or the territory of more than one State.[36]

The Operating Companies would provide telephone service from one point in an exchange area to other points in the same exchange area — "exchange telecommunications"[37] — and they would originate and terminate calls from one exchange area to another exchange area — "exchange access."[38] The interexchange portion of calls from one exchange area to another exchange area[39] would, however, be carried by AT&T and the other interexchange carriers, such as MCI and Southern Pacific Co.[40]

The proposed decree sets forth general principles governing the configuration of the Operating Companies[41] which AT&T would be required to divest.[42] Under the proposal, AT&T

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[35] Competitive Impact Statement at 30. The exchange areas would generally be smaller than the area served by a so-called Class Four Office.

[36] AT&T would have the initial responsibility for drawing the boundaries of exchange areas, but its plan would have to be submitted to the Department of Justice for its approval.

[37] Also referred to herein as intraexchange service. This may roughly be equated with local telephone service.

[38] That is, they would provide local access to interexchange carriers.

[39] In general, this is the service commonly known as long distance service.

[40] The Operating Companies must also provide access services to link their subscribers with companies providing information services. This category of service, discussed in Part VI, *infra*, includes information retrieval, automatic telephone answering services, and electronic publishing.

[41] The number of new Operating Companies is not specified in the settlement proposal. AT&T has indicated that its reorganization plan will provide for the amalgamation of the twenty-two Operating Companies into seven regional Operating Comapnies.

[42] The proposal would permit AT&T to determine the method by which divestiture will take place.

would be required to endow the companies with sufficient personnel, facilities, systems, and rights to technical information to enable them to provide exchange telecommunications and exchange access services.[43] These personnel, systems, facilities and rights would be drawn from the Operating Companies and from AT&T and its other affiliates. AT&T would be permitted to choose to transfer some of these elements directly to the new Operating Companies and to place others in a central entity jointly owned by them.

AT&T would be required by the proposed decree to formulate a plan of reorganization which complied with these principles, and to submit the plan to the Department of Justice within six months after the Court approved the decree. The plan would not be effective without the Department's approval.

After divestiture, the new Operating Companies would be required to provide, through a centralized body, a single point of contact for national security and emergency preparedness. They would be permitted to use this or a similar central body to provide those services, such as administration and engineering, which "can most efficiently be provided on a centralized basis." In addition, until September 1987, AT&T, Western Electric, and Bell Laboratories would have to provide on a priority basis, all research, development, manufacturing, and other support services necessary to enable the Operating Companies to fulfill the requirements of the proposed decree.[44]

Section II of the proposed decree would complement these structural changes by various restrictions which are said to

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[43] If a facility had both intraexchange and interexchange functions, it could not be jointly owned by AT&T and the Operating Company, but it could be shared through a leasing or similar arrangement, provided the Operating Company retained control over the intraexchange portion of the facility.

[44] The proposal would further bar AT&T from reacquiring the stock or assets of the divested Operating Companies, and it would require the cancellation of the License Contracts between AT&T and the Bell Operating Companies and of the Standard Supply Contract between Western Electric and the Operating Companies.

be designed (1) to prevent the divested Operating Companies from discriminating against AT&T's competitors, and (2) to avoid a recurrence of the type of discrimination and cross-subsidization that were the basis of the *AT&T* lawsuit.

The first group of these provisions would require the divested Operating Companies to provide services to interexchange carriers[45] equal in type, quality, and price to the services provided to AT&T and its affiliates.[46] In addition, they would be prohibited from discriminating between AT&T and other companies in their procurement activities, the establishment of technical standards, the dissemination of technical information, their use of Operating Company facilities and charges for such use, and their network planning. The Justice Department has indicated that it intends these provisions to be "construed broadly to encompass all potential areas of favoritism, subtle as well as overt, that may arise in relationship between the divested BOCs and AT&T and its competitiors." Competitive Impact Statement at 26-27.

The second type of restriction imposed upon the Operating Companies is said to be intended to prevent them from engaging in any non-monopoly business so as to eliminate the possibility that they might use their control over exchange services to gain an improper advantage over competitors in such businesses. Thus, the Operating Companies would not be permitted (1) to manufacture or market telecommunications products and customer premises equipment; (2) to provide interexchange services, (3) to provide directory ad-

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[45] The information access functions performed by the Operating companies for providers of information services would also be subject to the equality requirement.

[46] Appendix B of the proposed decree describes in greater detail the requirement imposed by Section II on the Operating Companies to provide equal access to all interexchange carriers. According to the Competitive Impact Statement, these provisions are based on the principles (1) that the Operating Companies should have latitude to provide access in the manner they deem most efficient, (2) that they must meet performance and pricing criteria to ensure equal access, and (3) that a transition period is necessary to phase in these equal access requirements. See Part VII *infra*.

vertising such as the Yellow Pages; (4) to provide information services; and (5) to provide any other product or service is not a "natural monopoly service actually regulated by tariff." The Operating Companies would have the authority, however, to engage in what are called the "inherent" functions of procurement, engineering, marketing, and management.

Section III of the agreement provides that the decree would be binding on AT&T and the Operating Companies and their successors and that it would not constitute any evidence against, an admission by, or an estoppel against AT&T or the Operating Companies.[47]

The proposed decree contains a number of enforcement provisions. Section V would impose a requirement upon AT&T and the Operating Companies to inform their employees of their obligations under the decree. Section VI would grant to the Department of Justice the right of access to AT&T and the Operating Companies to inspect books, interview and depose employees, and demand reports.[48] Section VII provides that the Court would retain jurisdiction for the purpose of issuing orders to construe or carry out the settlement, to modify it, to enforce compliance, and to punish violations, upon application of the parties and, after the reorganization, upon the application of an Operating Company.

Finally, the proposed decree would vacate the final judgment entered on January 24, 1956 in the *Western Electric* case, eliminating the restrictions imposed upon AT&T by that decree.

On January 11, 1982, Judge Vincent Biunno of the District Court for the District of New Jersey, following a brief hearing, approved the proposed decree, interpreting it solely as a modification of the 1956 consent judgment, but he did not,

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[47] The limitation of the proposed decree's *res judicata* effect is apparently designed to prevent its use in private antitrust litigation as *prima facie* evidence of AT&T's liability pursuant to section 5(a) of the Clayton Act, 15 U.S.C. § 16(a). See note 25 *supra* and Part X *infra*.

[48] There are special exceptions for privileged materials, and information collected may not be disseminated except to the FCC and in connection with court proceedings to secure compliance.

initially, agree to the parties' request for a transfer of the *Western Electric* action to this Court.

The following day, this Court held a hearing and continued in effect its order that the stipulation of dismissal which the parties had attempted to file in the *AT&T* action here be simply lodged pending completion of the appropriate public interest proceedings. Judge Biunno thereafter granted the parties' motion for a transfer of the *Western Electric* action, that action was docketed here under Civil Action No. 82-0192 and, by order of this Court, it was consolidated with the *AT&T* action. At the same time, this Court vacated the order of January 11, 1982, which had approved the proposed decree, and it ordered that procedures equivalent to those required by the Tunney Act be applied to the consolidated actions.[49]

C. Procedures in Connection with the Settlement Proposal

The Tunney Act provides that a proposal for a consent judgment submitted by the United States in an action brought under the antitrust laws may not be entered by the Court without prior compliance with certain procedures. These procedures include a sixty-day comment period, publication of a competitive impact statement by the Department of Justice, a sixty-day period for the receipt of public comments, and a determination by the Court that "the entry of such judgment is in the public interest."[50] For the purpose of this public interest determination the Court may consider

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

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[49] Order filed January 21, 1982. See Part I(C) *infra*.

[50] 15 U.S.C. § 16(e).

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of public benefit, if any, to be derived from a determination of the issues at trial.

Procedurally the Court may

(1) take testimony of Government officials or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate;

(2) appoint a special master and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the views, evaluations, or advice of any individual, group or agency of government with respect to any aspects of the proposed judgment or the effect of such judgment, in such manner as the court deems appropriate;

(3) authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae, intervention as a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate;

(4) review any comments including any objections filed with the United States under subsection (d) of this section concerning the proposed judgment and the responses of the United States to such comments and objections; and

(5) take such other action in the public interest as the court may deem appropriate.

15 U.S.C. § 16(e), (f).

When they filed the present proposed decree, the government and AT&T took the position that the Tunney Act did not apply because (1) their submission in the District Court for the District of New Jersey was merely a "modification" of an existing consent judgment, as distinguished from the

entry of a judgment,[51] and (2) no consent judgment at all was filed in this Court, but only a dismissal of the pending action.[52]

In the opinion of this Court, that reasoning may most charitably be described as disingenuous. It that reasoning were deemed acceptable, the parties here — and in similar antitrust actions — could subvert the clearly expressed will

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[51] The theory apparently was that the Tunney Act does not apply to such modifications of existing decrees because most modifications are relatively minor and of interest only to the parties involved. There appears to be conflicting law on this subject. Compare *United States* v. *Motor Vehicle Manufacturers Ass'n.*, 1981-2 Trade Cas. ¶ 64,370 (C.D. Cal. 1981) with *United States* v. *Swift & Co.*, 1975-1 Trade Cas. ¶ 60,201 (N.D. Ill. 1975). Nevertheless, the government recognizes that when a major modification of an existing decree is proposed, the Tunney Act procedures "help facilitate thorough exposition and review." See Letter of Assistant Attorney General William F. Baxter to the Court (January 18, 1982). To this end, Tunney act or comparable procedures have been followed at least in cases where major modifications of decrees have been made. See note 67 *infra*.

[52] As the Court has previously commented (see Tr. 25040-45), there appear to be at least two problems with the parties' "dismissal" theory. First, for all intents and purposes, the settlement would dispose primarily not of the 1949 action (which matured into a consent decree in 1956 — 26 years ago) but of the lawsuit that at the time of the settlement was actively in trial and had been in trial for ten months. Indeed, as the recitation in Part I(B) above demonstrates, the proposed decree deals almost exclusively with *AT&T* — rather than *Western Electric* — issues. These basic facts cannot be obscured by the facile expedient of filing the proposal in New Jersey and denominating it a modification of the New Jersey decree. Second, while Fed. R. Civ. P. 41(a)(1) provides that the parties may file a dismissal without leave of court under certain circumstances, this may not be done where a statute provides otherwise. In the view of the Court, the Tunney Act is just such a statute.

Contrary to the parties' continued protestations that, notwithstanding these considerations, the *AT&T* litigation has been dismissed because they allegedly filed a dismissal notice, the lawsuit is pending and very much alive. As noted, this Court issued an order on January 8, 1982, that the dismissal notice was only to be lodged, not filed. Whatever may be the proper rule in other circumstances — a matter on which the Court expresses no opinion — at least when the dismissal of a major antitrust action has substantive aspects or is so closely tied to a "modification" of another decree as is the case here, Tunney Act procedures apply. The parties have not appealed the Court's decisions which refused the filing of the dismissal notice and required application of Tunney Act procedures.

of Congress by a mere act of labelling. The Tunney Act was designed to expose to public scrutiny and to a judicial public interest determination the settlements negotiated between the Department of Justice and the various antitrust defendants. The instant agreement, whatever the label the parties chose to affix, settled two such lawsuits. That settlement, moreover, not only disposed of what is the largest and most complex antitrust action brought since the enactment of the Tunney Act but the settlement itself raises what may well be an unprecedented number of public interest questions of concern to a very large number of interested persons and organizations. See note 60 *infra*. As the Court made clear from the very day the settlement was announced, it was not and is not prepared to allow this circumvention of the congressional purpose.[53]

In any event, the parties have now stated in various ways and before various forums (including before this Court) that, irrespective of their opinion of the technical applicability of the Tunney Act, they are willing[54] to have the Tunney Act procedures applied by this Court.[55] In view of those representations, it became unnecessary for the Court to pass specifically upon the technical applicability of the Act. Instead, the Court on January 21, 1982, entered an order which, pursuant to the parties' consent and the Court's general

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[53] Tr. 25039-46. See also Part II(A) *infra*.

[54] This willingness took especially concrete form after the Court expressed its views on the matter on January 12, 1982. See note 50 *supra*; letter from Assistant Attorney General Baxter to the Court (January 18, 1982); letter from Jim G. Kilpatrick, General Attorney for AT&T, to the Court (January 18, 1982).

[55] The parties have also stated that in their view the early approval by the New Jersey District Court of the settlement proposal does not preclude this Court from following the full Tunney Act procedures. See, *e.g.*, Response of the United States to Public Comments, May 20, 1982 [hereinafter Department of Justice Response to Comments]; Reply Comments of the American Telephone and Telegraph Co., May 21, 1982 [hereinafter AT&T Reply Comments]; letter of the parties to the Court dated January 18, 1982; statement of counsel for the parties, January 12, 1982 (Tr. 25,016-26).

equitable powers,[56] applied the substantive Tunney Act procedures to the instant settlement.

Following the entry of that order, and in compliance therewith,[57] the parties filed the appropriate pleadings and reports.[58] After the Court issued its January 21 order — and

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[56] See, *e.g.*, *United States* v. *Swift & Co.*, 1975-1 Trade Cas. ¶ 60,201 (N.D. Ill. 1975); *United States* v. *Ling-Temco-Vought, Inc.*, 315 F. Supp. 1301 (W.D. Pa. 1970); *United States* v. *F. & M. Schaefer Brewing Co.*, 1968 Trade Cas. ¶ 72,345 (E.D.N.Y. 1967); *United States* v. *Carter Products, Inc.*, 211 F. Supp. 144 (S.D.N.Y. 1962).

[57] However, on February 5, 1982, in its filing disclosing its lobbying activities in conformity with section 11 of the Court's order of January 21, 1982, AT&T stated that it made that filing "[i]n conformance with § 2(g) of the Antitrust Procedures and Penalties Act ('APPA'), 15 U.S.C. § 16(g)" rather than under the Court's order. In its subsequent public advertisements, AT&T has likewise taken the position that the settlement proposal is being reviewed by this Court "as provided in the antitrust statutes." See, *e.g.*, AT&T Advertisement "A Plea for Orderly Policy-making," *Washington Post*, March 28, 1982, at A28.

[58] On January 28, 1982, the government published the proposed decree in the Federal Register (47 Fed. Reg. 4166 (1982)); on February 5, 1982, AT&T filed with the Court its description of the written and oral communications made on its behalf with any officers or employees of the United States regarding the proposed decree; on February 10, 1982, the government filed with the Court its Competitive Impact Statement, and on February 17, 1982 published it in the Federal Register (47 Fed. Reg. 7170 (1982)); beginning on February 19, 1982, the government made copies of the proposed decree available at the twenty-six district courts specified in the Court's order of January 21, 1982; over a period of two weeks in February, 1982, the government published in newspapers of general circulation in these twenty-six districts, a summary of the proposed decree and the Competitive Impact Statement and directions for the submission of written public comments; from February 19 to April 20, 1982, there was a sixty-day public comment period; on April 21, April 23, April 27, and May 4, 1982, the government filed these written comments with the Court; as set forth in the Court's order of May 5, 1982 and in lieu of publishing all written comments, on May 10, 1982, the government issued a press release describing the procedures for obtaining copies of comments, and on May 17, 1982 published the press release in the Federal Register (47 Fed. Reg. 21214 (1982)); on May 17, 1982, the government published in the Federal Register the name and address of everyone who filed a written comment and the number of pages in each comment (47 Fed. Reg. 21214 (1982)); and on May 20, 1982, the government made available in each of the twenty-six districts referred to above a copy of every comment received.

even prior to that time[59] — a considerable number of individuals and entities sought to intervene in these proceedings for various purposes.[60] On February 5, 1982, the Court issued an order denying all such requests.[61] The Court also received

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[59] Those motions to intervene filed prior to the Court's issuance of the January 21 order were denied in that order.

[60] Among those who have sought to intervene, submitted procedural or substantive suggestions, or entered their appearances through counsel are the following: Alabama Public Service Commission; Alarm Industry Telecommunications Committee; State of California; Public Utilities Commission of California; Computers and Communications Industry Association; Continental Telephone Corporation; Independent Data Communications Manufacturers Association; Jack Faucett Associates, Inc.; the States of Maine, Alabama, Arizona, Colorado, Idaho, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Minnesota, Montana, New Hampshire, New Mexico, North Dakota, Oregon, Rhode Island, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, and Wyoming; MCI Communications Corp.; State of Michigan; Michigan Public Service Commission; State of Missouri; State of New York; New York State Consumer Protection Board; Public Service Commission of the State of New York; National Association of Regulatory Utility Commissioners; National Citizens Committee for Broadcasting; Public Citizen; Consumer Federation of America; Rep. Ron Mottl; Media Access Project; Consumer Utility Board of Wisconsin; State of New Mexico; North American Telephone Association; Southern Pacific Communications Corp.; Tandy Corp.; Tennessee Public Service Commission; U.S. Telephone Communications, Inc.; Public Service Commission of the District of Columbia; Public Advocate of New Jersey; Consumer Counsel of Ohio; National Association of State Consumer Advocates; General Communications, Inc.; Control Data Corp.; International Telephone and Telegraph Corp.; Federal Communications Commission; Illinois Commerce Commission; Citizens of the State of Florida; Office of Communications United Church of Christ; Public Service Commission of Wisconsin; General Telephone & Electronics Corp.

[61] The order explained that under the Tunney Act, permission to intervene is strictly within the Court's discretion; that it was premature to allow anyone to intervene because the public comment procedures provided ample protection for all legitimate interests at this stage of the proceedings; that at the end of the public comment period, the Court would establish a framework to ensure effective participation in further proceedings and would again consider what status should be given to participants; and that the denials to intervene were without prejudice to appropriate applications to intervene made at some later date.

Subsequent requests for intervention were disposed of on a similar basis. On March 25, 1982, for example, the Court denied the petition to intervene

a considerable number of comments from individual citizens. All such comments were filed in the Public Interest Docket,[62] and duplicates were turned over to the Department of Justice for its response in accordance with paragraph 8 of the January 21, 1982 order.[63]

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by the Public Service Commission for the District of Columbia and it reiterated (1) that there is no absolute right to intervene in these proceedings, and (2) that for the reasons stated in the February 5, 1982 order, no useful purpose would be served by allowing permissive intervention at this stage. Following the entry of that order, the Commission petitioned the United States Court of Appeals for a writ of mandamus directing this Court to permit it to intervene. In an order issued April 8, 1982, this Court denied a motion for a stay of all proceedings pending the appellate review, finding that none of the elements required for the granting of such relief had been satisfied. On June 1, 1982, the Court of Appeals denied the petition for a writ of mandamus, granted AT&T's motion to dismiss, and denied as moot the Commission's motion for a stay of proceedings, its motion for oral argument, and its motion to expedite appeal. In an accompanying Memorandum, the Court of Appeals stated "[w]e conclude that the District Court was correct in denying intervention of right at this stage of the proceedings." *United States* v. *AT&T*, C.A. No. 82-1321, Order and Memorandum (D.C. Cir. June 1, 1982).

Petitions to intervene filed by other participants were denied in orders issued April 14, May 5, and June 4, 1982. In addition, on August 2, 1982, the Court of Appeals granted the motion of the State of Michigan to dismiss voluntarily its appeal of this Court's denial of its motion to intervene. *United States* v. *AT&T*, No. 82-1389 (D.C. Cir. Aug. 2, 1982). However, in an order issued May 25, 1982, which established further procedures to focus and sharpen the various issues raised during the public comment period, the Court invited all interested persons to apply for intervenor or amicus curiae status to the extent that they believed and could demonstrate that such status was necessary and appropriate to protect their particular interests. For subsequent developments regarding intervention, see Part XI *infra*.

[62] In its February 5, 1982 order, the Court established a separate docket, Misc. No. 82-0025 (PI), for the filing of all documents relating to the public interest proceedings. The documents in this file have been treated as part of the record and have been utilized by the Court in considering the various issues raised in the public interest proceedings. For this docket, normal filing rules were waived to permit maximum participation by individual citizens as well as by persons and organizations represented by counsel.

[63] On July 27, 1982, the chairman of the Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Commerce, and four of his colleagues, forwarded to the Court

During the months of April and May, 1982, the Department of Justice filed with the Court the comments it had received during the preceding sixty days, and on May 20, 1982, it filed its response to those comments.[64]

On May 25, 1982, the Court issued a Memorandum governing further proceedings. The Memorandum identified a number of key issues that were raised by the comments and the responses, and it invited the parties and the various interested persons to brief these issues in a form more suitable to judicial adjudication than the necessarily somewhat diffuse comments. A hearing was held on June 29 and 30, 1982, at which time the issues were further elucidated and refined.[65] The Court's substantive conclusions based upon the comments, responses, briefs, oral arguments, and the entire record herein, are discussed below.

II

Power of the Court in this Public Interest Proceeding

Under the Tunney Act, the Court may approve the decree proposed by the parties only if it first determines that such approval is "in the public interest."[66] Before discussing the substantive provisions of the proposed decree, it is appropriate to set out the standards which will guide the Court's public interest review.[67]

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a letter with a number of recommendations and copies of the subcommittee's hearings on H.R. 5158, a bill to amend the Telecommunications Act of 1934. Copies of the letter were served on counsel for both parties; the Court ordered a copy placed in the court jacket; and it has considered these views pursuant to subsection (f)(2) of the Tunney Act.

[64] The next day, pursuant to leave of Court, AT&T filed its own reply to the comments.

[65] Twenty counsel from eighteen organizations presented oral argument during this two-day hearing.

[66] 15 U.S.C. § 16(e). While the Court has not held that the Tunney Act applies of its own force in this case, it is following the requirements of the statute in these proceedings. See pp. 19–22 *supra*.

[67] The standards are the same whether the judgment is regarded as "new" or as a modification of the 1956 decree in the *Western Electric* action. See *United States* v. *Motor Vehicle Manufacturers Ass'n*, 1981-2 Trade

A. Purpose of the Tunney Act

In enacting the Tunney Act, Congress sought to ensure that the Justice Department's use of consent decrees in antitrust cases would fully promote the goals of the antitrust laws and foster public confidence in their fair enforcement.[68] The legislators found that prior practice, which gave the Department almost total control of the consent decree process, with only minimal judicial oversight, failed to accomplish these ends.

The legislative history shows that Congress was particularly concerned that the "excessive secrecy" of the consent decree process deprived the public of the opportunity to scrutinize and comment upon proposed decrees, thereby undermining confidence in the legal system.[69] In addition, the legislators found that consent decrees often failed to provide appropriate relief, either because of miscalculations by the Justice Department[70] or because of the "great influence and

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Cas. ¶ 64,370 (C.D. Cal. 1981) (applying Tunney Act); *United States* v. *General Electric Co.*, 1977-2 Trade Cas. ¶ 61,659 (E.D. Pa. 1977) (applying public interest test); *United States* v. *Swift & Co.*, 1975-1 Trade Cas. ¶ 60,201 (N.D. Ill. 1975) (applying public interest test). Courts have applied a stricter standard of review only when modifications of existing decrees are contested by one of the parties. See *United States* v. *Swift & Co.*, 286 U.S. 106 (1932); Note, *Construction and Modification of Antitrust Decrees*, 77 Colum. L. Rev. 296, 304 (1977).

[68] The importance of consent decrees as an antitrust enforcement tool — as evidenced by the fact that they were entered in approximately 80 percent of the government's cases at the time the Tunney Act was passed — was the source of much of the legislators' concern. See H.R. Rep. No. 93-1463, 93d Cong., 2d Sess. 6 (1974); 119 Cong. Rec. 3455 (1973) (Remarks of Sen. Gurney).

[69] 119 Cong. Rec. 24598 (1973) (Remarks of Sen. Tunney). See also 120 Cong. Rec. 36343 (1974) (Remarks of Rep. Mezvinsky); 120 Cong. Rec. 36343-44 (1974) (Remarks of Rep. Jordan).

[70] Senator Tunney stated:

> Regardless of the ability and negotiating skill of the Government's attorneys, they are neither omniscient nor infallible. The increasing expertise of so-called public interest advocates and for that matter the more immediate concern of a defendant's competitors, employees, or antitrust victims may well serve to provide additional data, analysis, or alternatives which would improve the outcome.

economic power" wielded by antitrust violators.[71] The history, indeed, contains references to a number of antitrust settlements deemed "blatantly inequitable and improper" on these bases.[72]

To remedy these problems, Congress imposed two major changes in the consent decree process. First, it reduced secrecy by ordering disclosure by the Justice Department of the rationale and the terms of proposed consent decrees and by mandating an opportunity for public comment.[73] Second, it sought to eliminate " 'judicial rubber stamping' of proposals submitted to the courts by the Department," by requiring an explicit judicial determination in every case that the proposed

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119 Cong. Rec. 3452 (1973). Senator Tunney further suggested that a lack of resources further hampered the Justice Department's enforcement efforts (119 Cong. Rec. 24600 (1973)) and that the Department sometimes simply did not insist upon sufficient remedial action by the defendant. 119 Cong. Rec. 24598 (1973).

[71] S. Rep. No. 93-298, 93d Cong., 1st Sess. 5 (1973); H.R. Rep. No. 93-1463, *supra* at 6. See also 120 Cong. Rec. 36341 (1974) (Remarks of Rep. McClory).

[72] 119 Cong. Rec. 24598 (1973) (Remarks of Sen. Tunney). References were made, among others, to *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Corp.*, 386 U.S. 129 (1967), where the Supreme Court found that the Department of Justice had consented to a decree which completely failed to alleviate the conditions found to violate the antitrust laws; to the 1956 decree in the *Western Electric* action (see Part I *supra*); and to the questionable circumstances surrounding the consent decrees entered in 1971 in cases involving the International Telephone and Telegraph Corp. (see *The ITT Dividend: Reform of Department of Justice Consent Decree Procedures*, 73 Colum. L. Rev. 594, 603–06 (1973)). 120 Cong. Rec. 36342-43 (1974) (Remarks of Rep. Holtzman); 120 Cong. Rec. 36345 (1974) (Remarks of Rep. Gunter); *Antitrust Procedures and Penalties Act: Hearings on S.782 and S.1088 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 76, 120, 135–36, 142–43, 147, 163–64, 181 (1973) [hereinafter cited as Senate Hearings]; *Consent Decree Bills: Hearings on H.R. 9203, H.R. 9947, and S. 782 Before the Subcomm. on Monopolies and Commerical Law of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 162–68 (1973).

[73] 15 U.S.C. §§ 16(b)–(d), (g). These procedures have been fully applied in this case. See pp. 21–24, *supra*.

decree was in the public interest.[74] It is clear that Congress wanted the courts to act as an independent check upon the terms of decrees negotiated by the Department of Justice,[75] and this Court will review the instant settlement in that spirit.[76]

B. Factors to be Considered

Although the statute is explicit as to the Court's obligation to make a public interest determination, it provides relatively little guidance as to the meaning of "public interest" in this context.[77] What is clear is that, whatever other factors a

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[74] H.R. Rep. No. 93-1463, *supra* at 8. See also 120 Cong. Rec. 36344 (1974) (Remarks of Rep. Jordan); 119 Cong. Rec. 3452 (1973) (Remarks of Sen. Tunney). Thus, Congress rejected case law to the effect that courts should not "assess the wisdom of the Government's judgment in negotiating and accepting [a] consent decree." *Sam Fox Publishing Co.* v. *United States*, 336 U.S. 683, 689 (1961). See also *Swift & Co.* v. *United States*, 276 U.S. 311, 331–32 (1928). The statute represents an endorsement of the line of cases in which courts examined proposed consent decrees to determine whether they were in the public interest. *E.g.*, *United States* v. *Ling-Temco-Vought, Inc.*, 315 F. Supp. 1301 (W.D. Pa. 1970); *United States* v. *Carter Products, Inc.*, 211 F. Supp. 144 (S.D.N.Y. 1962). See Senate Hearings, *supra* note 7, at 147-48 (Testimony of Hon. J. Skelly Wright).

[75] Accord, *United States* v. *National Broadcasting Co.*, 449 F. Supp. 1127, 1142 (C.D. Cal. 1978); *United States* v. *Morgan Drive Away, Inc.*, 1976-1 Trade Cas. ¶ 60,949 at 69,191 (D.D.C. 1976); *United States* v. *Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975).

[76] The Court's powers are not restricted by the circumstance that bills are pending in Congress concerning several of the issues raised in this case. The Tunney Act requires the Court to evaluate the decree proffered to it by the parties, and it is clear that it may not avoid this mandate merely because Congress might at some future date enact legislation in the same field. Just as the Court refused to delay the trial of the *AT&T* action when it was apprised of the possibility of legislative action (see order filed July 29, 1981; Transcript of Proceedings, July 29, 1981, at 8–10, 13–14) so it could not now abdicate its responsibilities with respect to the profferred decree because of possible future legislative activity. Congress may, of course, enact legislation overturning a decree entered by this Court.

[77] The statute specifies several criteria which a court "may" consider in making its public interest determination (see 15 U.S.C. §§ 16(e)(1), (2))

court may take into account, it must begin by defining the public interest in accordance with the antitrust laws. S. Rep. No. 93-298, *supra*, at 3; H.R. Rep. No. 93-1463, *supra*, at 11-12. It is therefore to the basic purposes of the antitrust laws that we must first turn.

The Supreme Court has repeatedly held that, in enacting the Sherman Act, Congress sought to "preserv[e] free and unfettered competition as the rule of trade." *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 4 (1958). See also *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978); *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 187 (1944). Competition has not been endorsed by the Congress and the courts as a purely academic matter. The need to safeguard free competition is a direct result of the fundamental premise of our economic system that

> unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

Northern Pacific Railway Co. v. *United States*, *supra*, 356 U.S. at 4. See also *National Society of Professional Engineers* v. *United States*, *supra*, 435 U.S. at 695.[78]

This policy is embodied in two types of legal standards — those applied to the liability phase of antitrust cases and those which govern the relief phase. Since the Court's determination here is concerned solely with remedies, the decisions granting relief after a finding of liability form the most relevant

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but the legislative history indicates that the listing of these factors was not meant to limit the court's inquiry. S. Rep. No. 93-298, *supra*, at 6; 120 Cong. Rec. 36344 (1974) (Remarks of Rep. Jordan); 119 Cong. Rec. 24599 (1973) (Remarks of Sen. Tunney). These criteria therefore cannot be regarded as embodying *the* standard against which a proposed decree is to be measured. For further discussion of these factors, see note 93 *infra*.

[78] There is an obvious conceptual similarity between competition in commerce as the foundation of our economic system and competition in ideas as the basis of our political system.

yardstick for determining whether the proposed consent decree will further antitrust policies, and the Court will therefore use these decisions as its basic standard.

Antitrust remedies, it is usually said, must "effectively pry open to competition a market that has been closed by defendants' illegal restraints." *International Salt Co.* v. *United States*, 332 U.S. 392, 401 (1947). See also 2 P. Areeda & D. Turner, *Antitrust Laws* § 327 (1978). A decree must "break up or render impotent the monopoly power found to be in violation of the Act,"[79] that is, it must leave the defendant without the ability to resume the actions which constituted the antitrust violation in the first place. For these reasons, the decree should not be limited to past violations; it must also effectively foreclose the possibility that antitrust violations will occur or recur. As the Court noted in *International Salt Co.* v. *United States*, *supra*, 332 U.S. at 400,

> it is not necessary that all of the untraveled roads to [anticompetitive conduct] be left open and that only the worn one be closed. The usual ways to the prohibited goals may be blocked against the proven transgressor.

See also *National Society of Professional Engineers* v. *United States*, *supra*, 435 U.S. at 697-98; *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 88 (1950); *Associated Press* v. *United States*, 326 U.S. 1, 22 (1945); *United States* v. *Crescent Amusement Co.*, *supra*, 323 U.S. at 188; *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 346-47 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954).[80]

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[79] *United States* v. *Grinnell Corp.*, 384 U.S. 563, 577 (1966). See also *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244, 251 (1968); *Schine Chain Theatres, Inc.* v. *United States*, 334 U.S. 110, 128-29 (1948).

[80] On this basis, the Court may at the relief stage prohibit practices which have not been found unlawful if such a prohibition is necessary to avoid the recurrence of monopolization. *United States* v. *United Shoe Machinery Corp.*, *supra*; see also *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 409 (1945). In addition, restraints may be imposed upon the defendant which are designed to allow the development of nascent competition within the relevant market. *Ford Motor Co.* v. *United States*, 405 U.S. 562, 575, 578 (1972).

While the issue of competition and the effects on competition which are at the heart of the antitrust laws should thus be deemed matters of paramount concern, it is clear from the cases that other factors are not irrelevant.[81] As the Supreme Court has put it, antitrust violations should be remedied "with as little injury as possible to the interest of the general public" and to relevant private interests. *United States* v. *American Tobacco Co.*, 221 U.S. 106, 185 (1911). See also, *United States* v. *E.I. duPont de Nemours*, 366 U.S. 316, 327-28 (1961). When choosing between effective remedies, a court should impose the relief which impinges least upon other public policies. *United States* v. *American Tobacco Co.*, *supra; United States* v. *E. I. duPont de Nemours*, *supra; United States* v. *Terminal Railroad Ass'n*, 224 U.S. 383, 410 (1912).[82] Thus, the Court would be justified in rejecting the proposed decree or requiring its modification[83] if it concluded that the decree unnecessarily conflicts with important public policies other than the policy embodied in the Sherman Act.

C. Degree of Deference to the Proposal Submitted by the Parties

Where, as here, a court is evaluating a settlement, it is not as free to exercise its discretion in fashioning a remedy as it would be upon a finding of liability. For when parties enter into a consent decree, they

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[81] The parties to this litigation as well as most interested third persons have expressly recognized that, in assessing whether the proposed decree is in the public interest, the Court may consider factors other than its effect on competition.

[82] However, where only one form of relief will effectively remedy the antitrust violation, it is that relief which must imposed, regardless of its impact on other interests. *National Society of Professional Engineers* v. *United States*, *supra*, 435 U.S. at 697-98; *United States* v. *E.I. duPont de Nemours*, *supra*, 366 U.S. at 327-28.

[83] The Court has the power to insist that the proposed decree take account of these other values. See *United States* v. *Ling-Temco-Vought, Inc.*, 315 F. Supp. 1301 (W.D. Pa. 1970), where the court refused to enter a proposed consent decree until the parties acted to safeguard the pension rights of the employees of the defendant.

> waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and the elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.

United States v. *Armour & Co.*, 402 U.S. 673, 681 (1971). If courts acting under the Tunney Act disapproved proposed consent decrees merely because they did not contain the exact relief which the court would have imposed after a finding of liability, defendants would have no incentive to consent to judgment and this element of compromise would be destroyed. The consent decree would thus as a practical matter be eliminated as an antitrust enforcement tool, despite Congress' directive that it be preserved. See S. Rep. No. 93-298, *supra*, at 6; H.R. Rep. No. 93-1463, *supra*, at 6.

It follows that a lower standard of review must be applied in assessing proposed consent decrees than would be appropriate in other circumstances. H.R. Rep. No. 93-1463, *supra*, at 12. For these reasons, it has been said by some courts that a proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is "within the reaches of public interest." *United States* v. *Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975). See also *United States* v. *Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981); *United States* v. *Carrols Development Corp.*, 454 F. Supp. 1215, 1222 (N.D.N.Y. 1978); *United States* v. *National Broadcasting Co.*, 449 F. Supp. 1127, 1143 (C.D. Cal. 1978). Although these decisions are not necessarily binding,[84] this Court will follow a similar approach.

It does not follow from these principles, however, that courts must unquestioningly accept a profferred decree as long as it somehow, and however inadequately, deals with the antitrust and other public policy problems implicated in the lawsuit. To do so would be to revert to the "rubber

[84] There is no authoritative precedent from the Supreme Court or the Court of Appeals for this Circuit on this issue.

stamp" role which was at the crux of the congressional concerns when the Tunney Act became law. This consideration is especially potent in these cases, for several reasons.

First. This is not an ordinary antitrust case. The American Telephone and Telegraph Company, with its various components and affiliates, is the largest corporation in the world by any reckoning,[85] and the proposed decree, if approved, would have significant consequences for an unusually large number of ratepayers, shareholders, bondholders, creditors, employees, and competitors. Beyond that, it is clear that the divestiture of the Operating Companies, combined with the entry of AT&T into new competitive markets, will be an enormous undertaking, fraught not only with many problems and difficulties, but also with a potential for substantial private advantage at the expense of the public interest. In view of these considerations, and of the potential impact of the proposed decree on a vast and crucial sector of the economy and on such general public interests as the cost and availability of local telephone service, the technological development of a vital part of the national economy, national defense, and foreign trade, the Court would be derelict in its duty if it adopted a narrow approach to its public interest review responsibilities.[86]

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[85] The Bell System's total operating revenues in 1979 were over $45 billion, and in 1980, they exceeded $50 billion. These sums represent almost two percent of the gross national product of the United States in each of these years. The Bell System's net income for 1979 and 1980 was $5.6 billion and $6 billion, respectively. During 1979, the Bell System's net assets devoted to telephone service were valued at approximately $99.3 billion. At the end of 1979, the Bell System employed over one million people, and it was thus the largest employer in the United States with the exception of the federal government. Episode 5/57A, stipulation pars. 6, 8-9, 20. For a more impressionistic account of AT&T's size, see S. Kleinfeld, *The Biggest Company on Earth* (1982).

[86] There have been suggestions by some that the issues in these cases, involving as they do national telecommunications policy, should be left by the Court for Congress to decide. For the reasons stated in note 76 *supra* and otherwise, this is inappropriate. At the same time, a subject of this importance should not be decided solely by an agreement between the Department of Justice and a single company. The involvement of the Judiciary under the Tunney Act thus provides a useful safeguard.

Second. Some of those who during the legislative hearings took a narrow view of the judicial responsibilities under the Act suggested that the courts would generally not be able to render a sound judgments on settlements because they would not be aware of all the relevant facts.[87] But that factor is of relatively little relevance here, for this Court has already heard what probably amounts to well over ninety percent of the parties' evidence both quantitatively and qualitatively, as well as all of their legal arguments.[88] It is thus in a far better position than are the courts in the usual consent decree cases[89] to evaluate the specific details of the settlement.[90]

Third. These actions, and this settlement, have an unfortunate history. The 1956 *Western Electric* consent decree was evidently the product of the very kind of influence and pressure that Congress subsequently sought to prevent through the Tunney Act procedures. See pp. 3–7 *supra*. That identical settlement, and the identical parties, are now before the Court. Nor can those events simply be dismissed as ancient history, irrelevant to the events of 1981–82. One needs only to recall the peculiar circumstances under which the instant settlement proposal was sought to be filed in the courts[91] and the recurrence of an inappropriate collaboration in the course

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[87] See, *e.g.*, Senate Hearings, *supra* note 72, at 71.

[88] In addition, the Court has received comments and briefs concerning the proposed decree from several hundred interested persons, as well as voluminous submissions from the parties.

[89] In *United States* v. *Ling-Temco-Vought, Inc.*, *supra*, 315 F. Supp. at 1309, the absence of a record forced the court to rely upon the parties' assurances that the proposed decree was in the public interest.

[90] In fact, the parties sought review of the proposed decree in this Court precisely because of its "substantial expertise on the competitive situation in the telecommunications industry." Letter from Assistant Attorney General William F. Baxter, dated January 18, 1982.

[91] See pp. 19–21 *supra*. Because of the method the parties chose, that proposal might either have escaped Tunney Act review altogether or it might at best have been reviewed only to the extent agreeable to them. See, *e.g.*, the Memorandum in Connection with Stipulation and Modification of Final Judgment, filed by the parties in the District Court in New Jersey which refers to the procedures in restrictive terms, mentioning specifically only the publication and Federal Register requirements of the Tunney Act.

of the litigation between the Department of Defense and AT&T similar to that which occurred in 1952–54. See *United States* v. *AT&T*, 524 F. Supp. 1331 (D.D.C. 1981).[92] These circumstances do not foster a sense of confidence that the assessment of the settlement and its implications may be left entirely to AT&T and the Department of Justice.

None of this means, of course, that the Court would be justified in simply substituting its views for those of the parties. But it does mean that the decree will receive closer scrutiny than that which might be appropriate to a decree proposed in a more routine antitrust case.

The Court concludes that, taking into account the various legislative and decisional mandates discussed above, it will apply the following standard to its evaluation of the proposed decree. After giving due weight to the decisions of the parties as expressed in the proposed decree, the Court will attempt to harmonize competitive values with other legitimate public interest factors. If the decree meets the requirements for an antitrust remedy — that is, if it effectively opens the relevant markets to competition and prevents the recurrence of anti-competitive activity, all without imposing undue and unnecessary burdens upon other aspects of the public interest — it will be approved.[93] If the proposed decree does not meet

[92] See also note 145 *infra*.

[93] This standard encompasses the criteria specified in the Tunney Act except for "consideration of the public benefit, if any, to be derived from a determination of the issues at trial." 15 U.S.C. § 16(e)(2). This factor directs the Court to consider the effect of the proposed decree upon the ability of private antitrust plaintiffs to recover against the defendant for injuries alleged to have resulted from the activity challenged in the government. See 119 Cong. Rec. 3452 (1973) (Remarks of Sen. Tunney). However, the legislative history indicates that this is a secondary factor in the assessment of the decree and that the government's agreement to make information and evidence available to private plaintiffs will ordinarily be sufficient. S. Rep. No. 93-298, *supra* at 6-7; H.R. Rep. No. 93-1463, *supra* at 8.

The vigor with which several private plaintiffs have pursued actions against AT&T indicates that further prosecution of the government's case is not warranted on this basis. In addition, the Justice Department has indicated its willingness to provide trial record materials to private plaintiffs. Competitive Impact Statement at 49 n. 34.

this standard, the Court will follow the practice applied in other Tunney Act cases[94] and as a prerequisite to its approval, it will require modifications which would bring the decree within the public interest standard as herein defined.[95]

III

Conflict Between the Proposed Decree and State Regulation

A number of interested persons, principally States and state regulatory commissions,[96] contend that this Court lacks the power to enter the decree proposed by the parties without the approval of the regulatory commissions acting under state law. The decree would require AT&T to take various actions for which regulatory approval is required under state law,[97] and it would restrict the Operating Companies with respect to activities which they are authorized to engage in under state regulation.[98] Because of this conflict, say the States, the decree may not be entered until the requisite permission from the various state agencies has been secured. The Department of Justice and AT&T assert in response that state law[99] is preempted to the extent that it bars execution of the decree.[100]

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[94] See, *e.g.*, *United States* v. *Gillette Co.*, *supra*, 406 F. Supp. at 714-15.

[95] The Court finds no basis in law or policy for the suggestion made by the FCC and some others that it may have the power to modify the proposed decree over the objections of the parties and enter it on its own motion on that basis. If the parties decline to incorporate the Court's recommended modifications, the 1956 decree in the *Western Electric* action will remain in effect, the *AT&T* trial will resume, and the Court will then make its own decision as to liability and, if appropriate, as to remedy. In view of the substantial completeness of the record, the parties might elect not to adduce additional evidence, in which event the Court would make its decision based on the present record.

[96] All of these persons will be referred to hereinafter as the States.

[97] Such as transferring assets.

[98] For example, long distance telecommunications and provision of customer premises equipment.

[99] The District of Columbia Public Service Commission contends that the effect of the antitrust laws upon the District regulatory statutes cannot be

A. General

This is not the first case in which States have argued that a federal court decree based upon federal law may not validly require actions prohibited by state law. These claims are almost as old as the Republic. One needs to recall only the

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analyzed under the preemption doctine because both are congressional enactments. However, courts have characterized such local statutes as state laws for the purpose of reconciling them with national policies. See *D.C. Federation of Civil Associations, Inc.* v. *Volpe*, 434 F.2d 436 (D.C. Cir. 1970); *Columbia Plaza Limited Partnership* v. *Cowles*, 403 F. Supp. 1337, 1341 (D.D.C. 1975); *District of Columbia* v. *Greater Washington Central Labor Council*, 442 A.2d 110 (D.C. 1982). The preemption doctrine would thus be an appropriate gauge of Congress' intent concerning the relationship between the D.C. statute and the antitrust laws.

The recent decision in *Feldman* v. *Gardner*, 661 F.2d 1295 (D.C. Cir. 1981), *cert. granted on other grounds*, 50 U.S.L.W. 3998.09 (June 28, 1982), in which the court held that the District of Columbia Court of Appeals is immune from antitrust liability, does not require a different result. That case concerned antitrust *liability*, not the respect to be accorded District of Columbia statutes in implementing an antitrust *remedy*. In light of the *Feldman* Court's conclusion that the District "remains a federal enclave lacking the sovereignty inherent in statehood," it would be anomalous if statutes concerning purely local affairs could thwart vindication of a national policy when the statutes of the sovereign states cannot have such an effect. 661 F.2d at 1307.

[100] The Court must decide the preemption issue at this juncture even though no State has yet taken specific action which conflicts with the terms of the proposed decree. In the first place, many States have made it abundantly clearly that, unless the Court acts, they will proceed in a manner inconsistent with the decree. Further, the Court must delineate its powers now with respect to the conflicting state claims so as to avoid issuing an overbroad decree. Finally, the possibility that provisions of the decree could be vetoed by regulators on a state-by-state basis, with the resulting "balkanized scheme of telecommunications service" (Joint Comments of Alabama, et al., at 12) would obviously have a bearing on the basic question whether the proposed decree would and could effectively open the telecommunications industry to competition. If the States' claims are valid, the Court and the parties might have to search for different means to implement the mandate of the Sherman Act herein. It follows that a resolution of this legal issue is necessary if the Court is to render a proper determination under the Tunney Act. It may be noted, too, that the parties to the settlement as well as those who object thereto are in agreement that a decision by this Court at this time is both appropriate and necessary.

great school desegregation disputes of the last thirty years, in the course of which a number of States justified their failure to comply with federal court injunctions by asserting that compliance was impossible because of the conflicting requirements of state law. The Supreme Court repeatedly and consistently held that the Supremacy Clause of the Constitution[101] rendered invalid any state authority that conflicted with the federal court order. *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 46 (1971); *Griffin* v. *County School Board*, 377 U.S. 218, 231-34 (1964); *Cooper* v. *Aaron*, 358 U.S. 1 (1958); see also *Morgan* v. *McDonough*, 540 F.2d 527 (1st Cir. 1976); *United States* v. *Indianola Municipal Separate School District*, 410 F.2d 626, 630-31 (5th Cir. 1969). More recently, in *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 695 (1979), the Court once again rejected the argument that state law restrictions could prevent a state regulatory agency from complying with a federal court's decree, reiterating that "[s]tate-law prohibition against compliance with the District Court's decree cannot survive the command of the Supremacy Clause of the United States Constitution."

While the basis for preemption is the Constitution, a preemptive effect in an individual case may be based on that document, on treaties, or on federal statutes such as the Sherman Act, which constitute valid exercises of federal power. See *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). In other words, if this Court has the authority under the Sherman Act to issue the proposed decree, state regulatory statutes are unenforceable to the extent that they prevent compliance with its terms.[102]

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[101] Art. VI, cl. 2 states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

[102] The fact that the decree would be issued pursuant to the parties' consent is irrelevant to its status, for a consent decree has the same effect as a decree issued after a finding of liability on the merits. *United States* v. *Swift & Co.*, 286 U.S. 106, 115 (1932). Accordingly, courts have found

The States cannot and most of them do not dispute that the conditions sought to be remedied by the decree fall within the broad sweep of the Sherman Act. Like the Commerce Clause of the Constitution,[108] the Sherman Act "extend[s] beyond activities actually *in* interstate commerce to reach other activities that, while wholly local in nature, nevertheless substantially *affect* interstate commerce." *McLain* v. *Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 241 (1980). See also *Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U.S. 738, 743 (1976). Similarly, the States do not dispute that the power of the Court under Section 4 of the Sherman Act, 15 U.S.C. § 4, to "prevent and restrain" violations of the statute is broad enough to encompass the decree proposed by the parties in this case. Their argument bypasses these general constitutional and antitrust principles to rely instead on certain specific aspects of the exercise of federal antitrust power, as follows.

1. *Tenth Amendment*

Several States assert — citing *National League of Cities* v. *Usery*, 426 U.S. 833 (1976) — that the proposed decree would unconstitutionally invade powers reserved to them under the Tenth Amendment. In that case, the Supreme Court held that Congress was foreclosed from extending minimum wage and maximum hour employment standards to persons employed by the States themselves, ruling (426 U.S. at 851-52) that activities in areas such as

> fire prevention, police protection, sanitation, public health, and parks and recreation .... are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services. Indeed, it is functions such

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that consent decrees displace state law to the same extent as do judgments on the merits. *Brown* v. *Neeb*, 644 F.2d 551, 563 (6th Cir. 1981); *United States* v. *American Society of Composers, Authors, and Publishers*, 442 F.2d 601 (2d Cir. 1971).

[108] Art. I, § 8, cl. 3. See *Heart of Atlanta Motel, Inc.* v. *Katzenbach*, 379 U.S. 241, 258 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964); *Wickard* v. *Filburn*, 317 U.S. 111 (1942).

> as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens. If Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' 'separate and independent existence.' . . . [T]he dispositive factor is that Congress has attempted to exercise its Commerce Clause authority to prescribe minimum wages and maximum hours to be paid by the States in their capacities as sovereign governments. . . . We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3. (footnotes omitted).

The Court made it abundantly clear that its decision was not to be regarded as a wholesale retreat from the principle of federal supremacy in the event of federal-state conflict; rather, the decision was strictly limited to the proposition that the Tenth Amendment imposes limitations on the "exercise of congressional authority directed . . . to the States as States." *Id.* at 845.

The progeny of *National League of Cities* have continued to distinguish sharply between federal regulation of States and such regulation of "private persons and businesses 'necessarily subject to the dual sovereignty of the government and of the State in which they reside.' " *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 286 (1981), *quoting National League of Cities* v. *Usery*, *supra*, 426 U.S. at 845. See also, *Federal Energy Regulatory Commission* v. *Mississippi*, 50 U.S.L.W. 4566 (June 1, 1982). As to the latter category of regulation, said the Court, there is "no Tenth Amendment impediment to congressional action." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, *supra*, 452 U.S. at 286.

The proposed decree imposes obligations only on private business. By its terms, it does not apply to the States at all; pursuant to the congressional power over interstate commerce

it simply regulates private activities which are without any doubt subject to that power. To be sure, some of these activities may also be subject to state regulation; but such confluence is not, and has never been held to be, regulation of "States as States."

The Supreme Court recently considered an analogous problem in *Federal Energy Regulatory Comm'n* v. *Mississippi*, *supra*. One of the statutory provisions at issue in that case permitted the Federal Energy Regulatory Commission to exempt certain private facilities from state laws. While the Court divided as to the application of the Tenth Amendment to other sections of the statute, it was unanimous in upholding this particular provision because, as the majority noted, "the Federal Government may displace state regulation even though this serves to 'curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important.' " 50 U.S.L.W. at 4570, quoting *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, *supra*, 452 U.S. at 290. See also 50 U.S.L.W. at 4575 n. 1 (O'Connor, J., dissenting).

2. *Communications Act*

Some States argue next that in enacting the Communications Act, Congress intended to prevent federal preemption of the state regulation of telecommunications permitted by that statute. There is no evidence whatever to support this proposition. Absent specific indication of congressional intent, the Court declines to read the Communications Act so as to immunize these state laws from preemption by other federal statutes.

Furthermore, the States' authority under the Communications Act is limited to "local services . . . that in their nature and effect are separable from and do not substantially affect the conduct or development of interstate communications." *North Carolina Utility Commission* v. *FCC*, 537 F.2d 787, 793 (4th Cir. 1976). The decree, of course, concerns matters which are beyond this limited grant of jurisdiction.

Finally, even if the Communications Act did support certain kinds of state regulation, it would not help the States here.

This Court has heard a variation of the argument they make when it was raised, again and again, by AT&T and has rejected it every time. *United States* v. *AT&T*, *supra*, 524 F. Supp. at 1345; *United States* v. *AT&T*, *supra*, 461 F. Supp. at 1320-30. As the Court previously stated, regulation under the Communications Act is neither sufficiently explicit nor sufficiently pervasive[104] to allow it to stand in the way of the enforcement of the antitrust laws.[105] All other courts which have had occasion in recent years to consider the subject of telecommunications antitrust immunity on account of regulation under the Communications Act have reached the same conclusion. *Phonetele, Inc.* v. *AT&T*, 664 F.2d 716 (9th Cir. 1981); *Sound, Inc.* v. *AT&T*, 631 F.2d 1324, 1327-31 (8th Cir. 1980); *Mid-Texas Communications Systems, Inc.* v. *AT&T*, 615 F.2d 1372, 1377-82 (5th Cir. 1980); *Essential Communications Systems, Inc.* v. *AT&T*, 610 F.2d 1114 (3rd Cir. 1979). See also, *National Gerimedical Hospital and Gerontology Center* v. *Blue Cross*, 452 U.S. 378 (1981). If the Communications Act itself and direct regulation by the FCC pursuant to that Act do not impair antitrust liability, *a fortiori* mere implied recognition in the Act of state regulation — assuming that there is such recognition — cannot stand in the way either of a finding of such liability or of the taking of necessary remedial action in implementation of the mandate of the Sherman Act.

B. Parker v. Brown

The States' primary contention is that the decree is barred by the state action exemption from the antitrust laws first announced in *Parker* v. *Brown*, 317 U.S. 341 (1943). In that case, the Supreme Court upheld a regulatory program which

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[104] See generally, *Gordon* v. *New York Stock Exchange*, 422 U.S. 659 (1975); *Otter Tail Power Co.* v. *United States*, *410 U.S. 366, 373-78 (1973)*.

[105] The Federal Communications Commission has consistently taken the same position. *In the Matter of Amendment of Subpart F of Part 1 of the Commission's Rules*, 42 F.C.C. 905, 906, 910-12 (1959); *In the Matter of the Applications of the Connecticut Water Co. & Woolridge Bros., Inc.*, 25 F.C.C. 1367, 1378 (1958). See also, Memorandum filed with this Court by the FCC as *amicus curiae* on December 30, 1975.

restricted competition among raisin growers by setting prices and limiting production. Finding no suggestion in the legislative history of the Sherman Act that such state action was to be restrained, the Court declined to find that the Sherman Act preempted the state law.

The *Parker* doctrine, which has been restated and applied a number of times since then,[106] "reflects Congress' intention to embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution." *Community Communications Co.* v. *City of Boulder*, 50 U.S.L.W. 4144, 4147 (Jan. 13, 1982). See also Areeda, *"Antitrust Immunity for 'State Action' After Lafayette,"* 95 Harv. L. Rev. 435, 436 (1981). At the root of the rule is the principle that federalism permits the States to impose a regime of economic regulation which is different from and inconsistent with the free competition principle mandated by the antitrust laws.

There are several reasons why the States' reliance on the *Parker* doctrine is misplaced.

In the first place, since the doctrine in rooted in the desirability of state experimentation and regulation, it is not at all self-evident that it is applicable to the type of activity involved in these cases. The telecommunications network is, technologically and economically, a national network with interdependent components.[107] Congress has recognized this interstate characteristic, with its impacts on the national economy and national defense, by exercising its power under the Commerce Clause to reserve federal control over interstate communications. *North Carolina Utility Commission* v. *FCC*, *supra*. It may be doubted that the *Parker* doctrine

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[106] *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *New Motor Vehicle Board* v. *Fox*, 439 U.S. 96 (1978); *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976); see generally 1 P. Areeda & D. Turner, *Antitrust Law*, *supra* at §§ 212-220.

[107] Even after the division of the network into various separate entities as a result of the divestiture, it will still be a national network in its operational sense. See Part X(A) *infra*.

may reasonably be extended to this kind of an activity which is national par excellence.

In any event, the *Parker* v. *Brown* line of cases does not establish that all state regulation *per se* serves to immunize activities from the federal antitrust laws. Such an immunity exists only if (1) the restraint is clearly articulated and affirmatively expressed as state policy, and (2) the policy is actively supervised by the State. *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc., supra*, 445 U.S. at 105. Moreover, preemption is precluded only under special circumstances and to achieve a specific goal: to allow the states to implement alternatives to the Sherman Act system of free competition. It is against these standards that the States' contention here must be tested.

The conduct that is the subject of these antitrust actions is clearly not beyond the reach of the federal antitrust laws[108] — a conclusion with which the States are in agreement.[109] That is so because some of that conduct (*i.e.*, the allegedly anticompetitive activity of AT&T in the intercity services market) is not under state regulation at all; and because the remainder (*i.e.*, AT&T's activity in the local services and equipment markets) is regulated by the states only in the sense that the local Operating Companies are required to file tariffs with respect thereto — actions which the courts have consistently held to be insufficient to qualify under the *Parker-Midcal* "active supervision" standard.[110] To put it another

[108] See *Phonetele, Inc.* v. *AT&T, supra; Sound, Inc.* v. *AT&T, supra*, 631 F.2d at 1327-31, 1334-35; *Essential Communications Systems, Inc.* v. *AT&T, supra*, 610 F.2d at 1125; *Northeastern Telephone Co.* v. *AT&T*, 477 F. Supp. 251 (D. Conn. 1978), *rev'd on other grounds*, 651 F.2d 76 (2d Cir. 1981); *United States* v. *AT&T, supra*, 461 F. Supp. at 1320-30.

[109] Brief on Topic Five of the Public Service Commission of Wisconsin, et al. at 8; Brief on Topic Five of State of California, et al., at 3.

[110] To be sure, the States are closely regulating such activities as the transfer of assets by entities within their jurisdictions and the types of business operations in which the Operating Companies may engage. But these subjects of state regulation are not the target of antitrust actions before the Court; the conduct that is being challenged is that of AT&T in the intercity services and equipment markets and, as indicated *supra*, that conduct is not being regulated by the States at all.

way, it is clear that state regulation would not be a defense during the liability phase of this or any other antitrust action based on similar conduct.

Since the conduct which is the subject of these lawsuits is thus well within the jurisdiction of the federal antitrust laws — as distinguished from the regulatory jurisdiction of the States — it would make no sense to hold that, in providing a remedy for the anticompetitive conduct,[111] the Court must refrain from interfering with state regulation.[112] Such a holding would in effect place this conduct in a non-man's land — not regulated by the states sufficiently to meet the *Parker-Midcal* test, yet immunized from effective federal antitrust jurisdiction because the antitrust remedy is barred by state regulations unrelated to this conduct.[113]

The practical consequences of such a rule to antitrust enforcement could be devastating.

No effective, unconditional antitrust judgment could be entered and enforced with respect to any subject matter area in which the states had established a system of regulation. The federal antitrust court would have to await the outcome, the benevolent agreement, of the local regulatory authorities before it could implement its decree. Should one or more States or their regulatory bodies object, the decree could not be enforced, irrespective of the necessity for such enforcement in the vindication of federal antitrust policy.[114] It is inconceivable that Congress could have intended to defer to state

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[111] The same rationale applies to its equivalent, a consent decree. Although the States' argument is directly addressed to the decree proposed by the parties, it is clear that the principle they espouse, if correct, would apply to judgments on the merits as well.

[112] It may be for this reason that no court has ever applied the *Parker* doctrine to thwart an antitrust remedy when the conduct in question was not shielded from liability.

[113] For example, in these cases, anticompetitive activity in the intercity carrier market would be protected because the remedy — divestiture — could be precluded by state regulations concerning the transfer of assets.

[114] An antitrust defendant would need to find just one sympathetic local regulatory body to achieve immunity from structural relief at the behest of a federal antitrust court.

laws in such a way as to preclude a court from effectively remedying an antitrust violation. Without effective relief, "the Government has won a lawsuit and lost a cause." *International Salt Co.* v. *United States, supra*, 332 U.S. at 401.[115]

Deference to state law in this type of situation would leave the Sherman Act powerless to eliminate anticompetitive activity,[116] even though the activity was not subject to state regulation sufficient to preclude application of the antitrust laws. This result is directly contrary to the thesis of the state action doctrine: that "[t]he national policy in favor of competition" is supplanted only when state regulation will take its place.[117] *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc., supra*, 445 U.S. at 106.

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[115] There is an obvious difference between direct state regulation and inchoate, general federal antitrust policy, on the one hand, and a conflict between such regulation and an explicit, valid federal court order, on the other. *Parker* deals only with the substantive scope of the antitrust laws, that is, with the situation which arises when a State has determined that, with respect to certain activities within its jurisdiction, the competition mandated by the Sherman Act is inappropriate for valid state public policy reasons. But there is nothing in the doctrine that would prevent the antitrust laws from prevailing when there is a conflict between a necessary antitrust remedy in a case in which the federal antitrust court has jurisdiction and in which the antitrust laws have been validly applied as a substantive matter and state regulatory schemes which would prevent such a remedy from being implemented. To hold otherwise, would be to stand proper deference to the policy of another political entity under the American constitutional system on its head.

[116] For example, the principal alternative to divestiture, a detailed injunction governing defendants' operations, would certainly conflict with state laws even more directly and on a continuing basis. While the remedy of damages would presumably still be available, it would not necessarily force defendants to cease any anticompetitive conduct. Moreover, there is no indication in the statute or in any court decision that the damages remedy is broader than the power to grant injunctive relief. The States' other alternative — an immediate spin-off of the Bell Operating Companies — would not open the telecommunications market to competition and would have severe adverse effects upon the national telephone system. See Part. XI(D) *supra*.

[117] Nothing in the proposed decree would require a State to replace its regulatory system with a system of competition: they may continue to

In these particular cases, the rule proposed by the States would reduce the Court's judgment to little more than an advisory opinion: AT&T would have to obtain the approval of the public utilities commission of every State before that judgment would actually be implemented. As the States themselves have said, if their claim were accepted, they would have the "unassailable authority to veto" the divestiture and to cause a "balkanized scheme of telecommunications service" should they so choose.[118]

The Court concludes that the state action doctine does not restrict the judicial power to impose an appropriate remedy under the Sherman act.

C. Avoidance of Unnecessary Conflict with State Law

The absence of absolute limitations upon a court's remedial powers under the Sherman Act does not mean that the court is free to ignore the States' legitimate interests.

It is well established that interference with state interests is not a favored approach; it is a measure to be employed only when necessary to vindicate federal law. Thus, a judicial remedy may infringe upon state law only to the extent necessary effectively to protect the federal interest. See *Milliken* v. *Bradley*, 433 U.S. 267, 280-81 (1977); *Morgan* v. *McDonough*, *supra*, 540 F.2d at 534.[119] Moreover, in exercising their discretion in fashioning antitrust remedies,[120] courts are obligated to minimize the impact of their decrees upon

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require a regulated monopoly in, say, local telephone service or intrastate toll service.

[118] See Joint Comments of Alabama and twenty-three other States at 12.

[119] It is presumably in reliance on these principles that the Department of Justice has conceded that "the Court should assure itself that the provisions of the proposed [decree] will not unnecessarily conflict with important state interests." Brief at 70. Another manifestation of the respect accorded to state interests is the courts' reluctance to impute to Congress an intent to bar the States from an entire field of regulation. See, *e.g.*, *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 128 (1978); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142 (1963).

[120] See, *e.g.*, *Ford Motor Co.* v. *United States*, *supra*, 405 U.S. at 573; *United States* v. *E. I. duPont de Nemours & Co.*, *supra*, 366 U.S. at 322.

other public policies (see Part II *supra*), including, of course, the policy against unnecessary interference with state interests.

Were the Court to fashion its own remedy following a finding of liability, it would accordingly be obligated to minimize interference with state law to the extent that may be done without vitiating or weakening the remedial measures required as a result of the findings made in the litigation. It is difficult to believe that when the parties arrive at a consent decree they have greater powers to override these principles than would the Court in drafting its own decree. In any event, whatever the parties may do, the Court would certainly be justified in taking the policy against unnecessary interference with state law and state policy into account when it passes upon the proposed judgment in a public interest proceeding.

It follows from what has been said that those provisions in the proposed decree which are necessary to vindicate the federal interest in the enforcement of the antitrust laws will be approved notwithstanding the fact that they may conflict with the state laws or interests. However, in its overall consideration of the public interest, the Court will also take into account that a particular provision may be merely peripheral to the federal interest but have a substantial adverse impact on state laws.[121]

IV

The Divestiture

A key feature of the proposed decree is the divestiture of the Operating Companies from the remainder of AT&T. In order to determine whether that divestiture is in the public interest, the Court must decide first whether it is a remedy that is likely to eliminate anticompetitive conditions within the telecommunications industry. In addition, the Court must assess the efficacy of alternative remedies, and it must also weigh the effect of the divestiture on the public interest

[121] See Part VII *infra*.

generally, particularly on the level of charges for local telephone service.

A. Conditions Necessitating Antitrust Relief

1. *Evidence of Anticompetitive Actions by AT&T*

In its complaint and in documents filed thereafter (*i.e.*, the several Statements of Contentions and Proof), the government asserted that AT&T monopolized the intercity telecommunications market and the telecommunications product market in a variety of ways in violation of the Sherman Act.

The evidence that was produced during the *AT&T* trial indicates that, at least with respect to several of the government's claims, this charge may be well taken. It would be inappropriate for the Court at this juncture to draw definitive conclusions with regard either to the sufficiency of the evidence to sustain a finding of liability or to the validity of AT&T's various legal and factual defenses. The Court is not called upon, in this public interest proceeding, to render a final judgment on this case; indeed, not all the evidence that may bear on the issues has yet been adduced.[122] It is not improper, however, for the Court to consider whether the state of proof at trial was such as to sustain this divestiture as being in the public interest. See 15 U.S.C. §§ 16(b)(2), (e).

In its intercity case, the government alleged that AT&T used its control over its local monopoly to preclude competition in the intercity market. The government proved *inter alia* that after 1968 AT&T included a "customer premises" provision in its interconnection tariff which deterred potential competitors from entering the market;[123] that it refused to

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[122] See p. 12 *supra*.

[123] Under this provision, a competitor could interconnect with the AT&T network only if the interconnection occurred in switching equipment located on the customer's premises where the telecommunication originated or terminated. The effect of this restriction was to prevent competitors from entering the intercity market gradually, and thus effectively from entering the market at all. For example, because of this restriction, a customer whose sole office was in St. Louis could not choose to use the services of an AT&T competitor for part of a route (*e.g.*, from St. Louis to Chicago),

provide FX and CCSA services to specialized common carriers and domestic satellite carriers until 1974 when the FCC specifically ordered it to do so;[124] and that it attempted to prevent competitors from offering metered long distance service that would compete with AT&T's own regular long distance service.[125]

AT&T's basic rationale for these policies was that it was attempting to prevent competitors from "creamskimming."[126] As viewed by AT&T, it would have been able successfully to combat creamskimming if it had priced each of its routes on the basis of the costs for operating that route. However, it concluded that the FCC had rejected this approach when it endorsed national rate averaging in the interest of promoting the goal of universal service. Accordingly, AT&T argued that, since rate averaging is inconsistent with competition, and since the basic rate averaging policy had been required

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and then AT&T's services for the remainder of the route (*e.g.*, from Chicago to Bethesda, Md.) because the St. Louis customer did not have the "premises" in Chicago that AT&T required for interconnection. Thus, to receive service for Bethesda as well as for Chicago, the customer was required to purchase both services from AT&T. See *United States* v. *AT&T*, *supra*, 524 F. Supp. at 1354.

[124] FX (foreign exchange) service permits a customer to make or receive local calls through a distant switching center by effectively providing a long extension cord in the form of a dedicated line between the customer's location and a telephone company switching system in the distant location (the foreign exchange). See *United States* v. *AT&T*, *supra*, 524 F. Supp. at 1355 n. 77. CCSA (common control switching arrangement) is essentially a miniature AT&T long distance network, except for the fact that it is used by only one customer, albeit a customer, such as the federal government, with large telecommunications needs.

[125] The government also alleged *inter alia* that AT&T discriminated against competitors in providing access to local exchange facilities; that it conducted interconnection negotiations with competitors in bad faith; and that it engaged in predatory behavior to eliminate at least one company as a provider of digital data transmission services. *United States* v. *American Telephone and Telegraph Co.*, *supra*, 524 F. Supp. at 1355-56.

[126] Creamskimming is a term the Bell System used during the *AT&T* trial and elsewhere to describe the practice of its competitors to concentrate their intercity services on routes where the volume of business is high and the costs of service are low.

by the FCC as being in the public interest, it was acting reasonably under the Communications Act in preventing competition as best and as long as it could.[127]

What this line of reasoning fails to consider is that, at least by the mid-1970s, the FCC had clearly begun to promote competition in telecommunications. The government contended during the trial — correctly, in the Court's view — that AT&T had an obligation to follow the more recent FCC policy rather than its previous policies which may have suited it better,[128] particularly since there was never a direct FCC rule against de-averaging. Moreover, even if, because of the lack of definite guidance from the FCC, AT&T's actions were to be regarded as reasonable under the Communications Act standards, it does not at all follow that these same actions were immunized under the standards of the Sherman Act.[129]

What is significant about these events is that AT&T was able to adopt the policies described above in large part because of its control over the local exchange facilities. For example, it was because of its ownership and control of the local Operating Companies — whose facilities were and are needed for interconnection purposes by AT&T's competitors — that AT&T was able to prevent these competitors from offering

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[127] See, *e.g.*, testimony of John D. deButts (August 27, 1981); Mark Garlinghouse (December 11, 1981); and William Ellinghaus (August 12, 1981).

[128] Obviously, AT&T preferred to operate as a monopoly provider of intercity services rather than to be forced to compete with other common carriers. (This is particularly true because once the FCC adopted a policy of competition, AT&T would be required to allow competitors to interconnect with the AT&T network). Thus, AT&T's self interest dovetailed neatly with its public interest argument.

[129] Under the antitrust laws, the burden would be on AT&T to show that what would otherwise be clearly unreasonable restraints on competition were cleansed by the regulatory directives. See, *e.g.*, *National Gerimedical Hospital and Gerontology Center* v. *Blue Cross*, 452 U.S. 378 (1981); *Sound, Inc.* v. *AT&T*, 631 F.2d 1324 (8th Cir. 1980); *Mid-Texas Communications Systems, Inc.* v. *AT&T*, 615 F.2d 1372 (5th Cir. 1980); *Essential Communications Systems, Inc.* v. *AT&T*, 610 F.2d 1114 (3rd Cir. 1979); *United States* v. *AT&T*, 524 F. Supp. at 1345, n. 14; *United States* v. *AT&T*, 461 F. Supp. at 1320-30.

FX and CCSA services. Similarly, AT&T was able to deter competition by manipulating prices for access to the Operating Company networks.[130]

AT&T's control over the local Operating Companies was central also to the anticompetitive behavior alleged with respect to the second facet of the government's case, that involving customer-provided terminal equipment.

The government proved that AT&T prohibited the attachment of competitors' equipment to the network except through a protective connecting arrangement (PCA). There was evidence that some experts (including a panel of the National Academy of Sciences)[131] believed that such a PCA was necessary[132] if the nationwide telephone network was to be protected from a variety of harms.[133] On the other hand, the government's evidence indicated that AT&T required PCAs for equipment that in all probability could not harm the network; that there were delays in providing PCAs; that the PCAs were over-designed and over-engineered, and, thus, over-priced; that PCAs were required for competitive equip-

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[130] See, *e.g.*, *United States* v. *AT&T*, *supra*, 524 F. Supp. at 1364–65 n. 118; testimony of William Ellinghaus and Mark Garlinghouse on cross examination, note 127 *supra*. AT&T's cost data were often confusing, incomplete, and inaccurate, and although some of its distinguished economists provided helpful and sophisticated economic analysis (*e.g.*, William J. Baumol, December 7, 1981), others (*e.g.*, Jules Joskow, October 23, 1981) did little to explain away the shortcomings of these data. At least on the basis of the evidence heard before the trial was recessed, the Court would be unable to conclude that AT&T's past pricing strategy did not pose anticompetitive problems.

[131] See *Technical Analysis of the Common Carrier/User Interconnections Area* by the Panel on Common Carrier/User Interconnections, National Academy of Sciences (1970), PX781 (admitted in evidence on behalf of defendants at Tr. 13500, August 24, 1981).

[132] See, *e.g.*, testimony of Charles Elmendorf (November 17, 1981); Robert B. Brunson (August 25, 1981).

[133] Throughout the trial, AT&T referred to four harms to the network: hazardous voltages, longitudinal imbalance, excess signal power, and improper network control signaling. These harms, it was alleged, could cause a variety of problems, ranging from severe physical injury to humans to a small amount of noise on a telephone line.

ment while identical equipment sold by AT&T did not require their use; and that PCAs could not guard against all four potential harms to the network.[134]

Additionally, the alternative option of certification[135] was available but never seriously pursued by Bell.[136] Moreover, when ultimately certification was directly mandated by the FCC as a substitute for the protective connecting arrangement, the telephone network — AT&T's predictions to the contrary notwithstanding — did not cease to function in its customary fashion. Indeed, AT&T was unable during the trial to prove *any* actual harm to the network from the elimination of the PCAs.

In its procurement part of the case, the government alleged, and there was proof, that AT&T used its control over the local Operating Companies to force them to buy products from Western Electric even though other equipment manufacturers produced better products or products of identical quality at lower prices. Here, too, AT&T's control of the Operating Companies was central to the allegedly anticompetitive behavior.[137]

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[134] See, *e.g.*, direct and cross examination of Donald H. Erickson (August 6, 1981), Edward Goldstein (August 4, 1981), and William Ellinghaus (August 12, 1981). It should also be noted, however, that, with respect to a number of these problems, AT&T did provide factual explanations of varying degrees of persuasiveness. *Compare* the testimony of Lawrence A. Hohmann (August 24, 1981) *with* that of Robert B. Brunson (August 25, 1981) who was convincing notwithstanding severe cross examination by the government.

[135] Under a certification program, non-Bell equipment may be connected directly to the AT&T network — without the use of a PCA — provided that the equipment has been certified as meeting certain technical standards.

[136] There is some merit to AT&T's claim that it was the FCC, rather than AT&T, that was responsible for the delay in the development of standards. Specifically, although the question of certification as opposed to PCA arose as early as 1968, the FCC did not request technical comments on the standards it had proposed until 1975.

[137] It should be noted, however, that the government's procurement case was not extremely strong. In the first place, it consisted only of sixteen individual "episodes." Measured against the large field of procurement decisions in which the Bell System was engaged, this was not a formidable

Without making definitive findings on any or all of the issues, it is certainly clear that — to the extent that the proposed decree is offered by the government on the premise that it will destroy the basis of past anticompetitive behavior — the Court would not be justified in rejecting it as constituting a remedy for non-existent anticompetitive acts.

2. *Concentration of Power in the Telecommunications Industry*

There is an additional reason, largely independent of the factors discussed above, which supports some type of antitrust relief in this case: AT&T's substantial domination of the telecommunications industry in general.

The antitrust laws are most often viewed as only a means for ensuring free competition in order to achieve the most efficient allocation of society's resources. See pp. 28–29 *supra*. However, Congress and the courts have repeatedly declared that these laws also embody "a desire to put an end to great aggregations of capital because of the helplessness of the individual before them." *United States*. v. *Aluminum Company of America*, 148 F.2d 416, 428 (2d Cir. 1945) (footnote omitted). See also *Standard Oil Co.* v. *United States*, 221 U.S. 1, 50 (1911); *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290, 323-24 (1897).

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number. It is difficult to evaluate, and the Court will not now evaluate, whether this relative paucity of evidence was due to intrinsic problems of proof when dealing with a company of the size of AT&T, or whether, having conscientiously and carefully surveyed Bell's activities, the government was simply unable to produce more than sixteen questionable episodes because there was no more even arguably anticompetitive activity. Moreover, even as to those sixteen episodes the proof was not overwhelming. Where the government's evidence tended to demonstrate anticompetitive acts, AT&T's market share was generally not high; where market share was high, there was relatively little evidence of anticompetitive acts.

The part of the case dealing with pricing of equipment sold by Western Electric was dismissed on September 11, 1981. See, *United States* v. *AT&T*, *supra*, 524 F. Supp. at 1380-81.

The legislators who enacted the Sherman Act voiced concerns beyond the effects of anticompetitive activities on the economy: they also greatly feared the impact of the large trusts which then dominated the business world on the nation's political system, and they regarded the power of these trusts as an evil to be eradicated. Thus, Senator Sherman stated:

> If the concentrated powers of [a] combination are intrusted to a single man, it is a kingly prerogative, inconsistent with our form of government, and should be subject to the strong resistance of the State and national authorities. If anything is wrong, this is wrong. If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessaries of life.

21 Cong. Rec. 2457 (1890).[188]

These views have been repeatedly echoed since that time, as, for example, during the congressional debates at the time of the enactment of the 1950 amendments to the Clayton Act. See 96 Cong. Rec. 16450 (1950) (Remarks of Sen. Kefauver); 95 Cong. Rec. 11494 (1950) (Remarks of Rep. Bryson); 95 Cong. Rec. 11486 (1949) (Remarks of Rep. Celler). See also *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 344 (1962). As Justice Douglas stated in his dissenting opinion in *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 536 (1948):

> Power that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy. Industrial power should be decentralized. It should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men. The fact that they are not vicious men but respectable and social-minded is irrelevant. That is the philosophy and the command of the Sherman Act. It is founded on a theory of hostility to the concentration in private hands of power

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[188] See also 21 Cong. Rec. 2460, 2569 (1890) (Remarks of Sen. Sherman); 21 Cong. Rec. 2593 (1890) (Remarks of Sen. George).

so great that only a government of the people should have it.[139]

Our political system is designed so that the power of one group may be checked by the power of another. The antitrust laws require this same approach in the economic sphere. Obviously, if one company controlled an essential part of the economy, it would be in a position to gain an undue influence over economic decisions and, as a result, most likely over political decisions. Thus, the antitrust laws seek to diffuse economic power in order to promote the proper functioning of both our economic and our political systems. See generally, A. D. Neale, *The Antitrust Laws of the United States of America*, 422-23 (1962); Blake & Jones, *Antitrust Dialogue: Defense*, 65 Colum. L. Rev. 337, 384 (1965).

The significance of these concepts is accentuated by the context in which the Court must consider the public interest in these cases. The telecommunications industry plays a key role in modern economic, social, and political life. Indeed, many commentators have asserted that we are entering an age in which information will be the keystone of the economy[140] as steel was when Justice Douglas wrote in the *Columbia Steel Co.* case.[141]

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[139] A number of distinguished commentators have challenged this interpretation of the antitrust laws, claiming that the promotion of consumer welfare through ensuing free competition is their sole goal. See R. Bork, *The Antitrust Paradox* 50-89 (1978); 1 P. Areeda & D. Turner, *Antitrust Law*, *supra* at §§ 103-112. Resolution of this dispute may be crucial when the two objectives point to different solutions. Here, where the remedy necessary to promote free competition is also likely to reduce the concentration of economic power, consideration of the latter would appear to be less controversial. In any event, the cases and the legislative history of the Sherman Act empower the Court to consider broad public interest goals, such as this one, in evaluating the need for an antitrust remedy.

[140] See, *e.g.*, G. Robinson, Ed., *Communications for Tomorrow* (1978).

[141] Commentators from a wide range of the ideological spectrum agree on this conclusion. Thus, Professor Arthur Schlesinger, Jr. has been quoted as stating that "Karl Marx held that history is shaped by control of the means of production; in our times history is shaped by control of the means of communication." T. White, *America in Search of Itself* at 101 (1982). Charles Marshall, AT&T executive vice president, and consumer advocate

The only pervasive two-way communications system is the telephone network. It is crucial in business affairs, in providing information to the citizenry, and in the simple conduct of daily life. In its present form, AT&T has a commanding position in the industry. The men and women who have guided the Bell System appear by and large to have been careful not to take advantage of its central position in America's economic life. There is no guarantee, however, that future managers will be equally careful.[142] In any event, it is antithetical to our political and economic system for this key industry to be within the control of one company.

For these reasons, the Court concludes that the loosening of AT&T's control over telecommunications through the divestiture of the Operating Companies will entail benefits which transcend those which flow from the narrowest reading of the purpose of the antitrust laws.

B. Effect of the Divestiture

The remedy in an antitrust action — whether imposed by a court or agreed upon between the parties — is measured both by how well it halts the objectionable practices and by its prospects for minimizing the likelihood that such practices will occur in the future. See Part II *supra*. Where, as here, the Court has heard substantially all of the evidence, it is appropriate that it weigh the proposed remedy against the evidence in that context.

As indicated in Part IV(A) *supra*, the ability of AT&T to engage in anticompetitive conduct stems largely from its

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Ralph Nader have likewise both noted the displacement of the industrial age by the information age. *Telecommunications Act of 1982: Hearings on H.R. 5158 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce (Part 2)*, 97th Cong., 2d Sess. 111, 587 (1982).

[142] One may speculate, for example, on the effect on the political life of this nation if a company or group with strong political or ideological opinions were to gain effective control of the present Bell System (particularly if the company, additionally, were not precluded from entry into information and electronic publishing services). See part VI(C) *infra*.

control of the local Operating Companies. Absent such control, AT&T will not have the ability to disadvantage competitors in the interexchange and equipment markets.

For example, with the divestiture of the Operating Companies AT&T will not be able to discriminate against intercity competitors, either by subsidizing its own intercity services with revenues from the monopoly local exchange services, or by obstructing its competitors' access to the local exchange network. The local Operating Companies will not be providing interexchange services, and they will therefore have no incentive to discriminate. Moreover, AT&T's competitors will be guaranteed access that is equal to that provided to AT&T, and intercity carriers therefore will no longer be presented with the problems that confronted them in that area. See Part VIII, *infra*.

Abuses will also be unlikely in the equipment interconnection area, for the simple reason that the Operating Companies will not manufacture equipment and will therefore lack AT&T's incentive to favor the connection of one manufacturer's equipment over another's. Even as to the part of the government's case dealing with procurement, the divestiture of the Operating Companies will go a long way toward eliminating the potential for anticompetitive behavior. Any pro-Western Electric bias on the part of these companies will be eliminated once the intraenterprise relationship between the Operating Companies and Western Electric is broken.[143]

To the extent, then, that the proposed decree proceeds on the assumption that the structural reorganization will make it impossible, or at least unprofitable, for AT&T to engage in anticompetitive practices, it is fully consistent with the public interest in the enforcement of the antitrust laws. The soundness of this remedy becomes even more apparent when it is compared with other relief alternatives.

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[143] Any cross subsidization of AT&T's intercity services and equipment manufacturing operations with revenue from its monopoly local exchange services will likewise be eliminated.

C. Alternative Remedies

In order to determine whether the divestiture proposed by the parties is the remedy which will most effectively fulfill the goals of the antitrust laws, it is appropriate for the Court to evaluate the various alternative remedies that may have been considered or proposed. See 15 U.S.C. § 16(e)(1).

Three alternatives to the divestiture of the Operating Companies emerged in the course of the *AT&T* litigation. The first would have required the divestiture of Western Electric and Bell Laboratories from AT&T.[144] The second, similar in concept if not in detail, would have had as its most salient feature the divestiture from AT&T of portions of Western Electric and Bell Laboratories and of several Bell Operating Companies.[145] The third was a strictly injunctive, non-structural remedy, which would have imposed detailed constraints upon AT&T's activities.[146] None of these alter-

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[144] This remedy was first proposed in the government's complaint. See Complaint at 14.

[145] Competitive Impact Statement at 50-51. The Operating Companies retained by AT&T would have been required to provide local telephone service through a separate subsidiary; several other problems would have been dealt with by injunctive provisions.

This proposal was considered by the parties in early 1981, just prior to the start of the trial in the *AT&T* action. At that time, in a successful effort to secure a continuance (see p. 11 *supra*), the parties advised the Court that a concrete settlement had been reached, with no substantive issues remaining to be resolved. See Memorandum Order filed January 16, 1981. However, the Competitive Impact Statement indicates that, to the contrary, no proposal was ever drafted. Competitive Impact Statement at 50.

[146] *Id.* at 51-52. This proposal was discussed by the parties "shortly prior to the negotiations that gave rise to the [present settlement]." *Id.* at 51. It would have required AT&T to grant non-discriminatory access for intercity carriers to the Bell Operating Companies' local exchange facilities, and it would have imposed limits on Western Electric's sales to the Bell System, in addition to limiting the dissemination of information and the rotation of personnel within the Bell System. These injunctive provisions would have been monitored by special masters appointed by the Court.

natives would be as efficacious as the divestiture of the Operating Companies embodied in the proposed decree.[147]

1. *Divestiture of Western Electric and Bell Laboratories*

The divestiture of all or part of Western Electric and Bell Laboratories from AT&T, with or without the divestiture of some, but not all, of the Bell Operating Companies,[148] suffers from several defects in comparison with the parties' present proposal: (1) it would not be as effective in eliminating anticompetitive conduct, and (2) it would have a greater adverse impact on future contributions of the Bell System to the national economy.

The inadequacy of the divestiture from the Bell System of its research and manufacturing arms as an antitrust remedy is obvious: it would not eliminate AT&T's ability and incentive to take anticompetitive actions against its competitors in the intercity market. The remedy would thus be ineffective in the very area in which the government's proof in the *AT&T* action was strongest.[149] In addition, this remedy would not eliminate AT&T's de facto control of the national telecommunications system. Although the company would no longer dominate the manufacturing and research markets, it would still control the essentials of American telecommunications — virtually all intercity and local services. The divestiture would thus not fulfill the goal of deconcentrating AT&T's vast economic power.

The divestiture of Western Electric and Bell Laboratories would suffer from an additional defect. Considerable evidence

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[147] The Court's evaluation of these remedies is conducted strictly in the context of its decision on the adequacy of a negotiated settlement. If the *AT&T* action were to proceed to final judgment and liability were found, the Court might determine that the measures discussed in this segment of the opinion are appropriate remedies, either as alternatives to the divestiture of the Operating Companies or in addition to such divestiture.

[148] Because of their conceptual similarities, the first and second alternate remedies are being discussed together.

[149] The additional divestiture of several Bell Operating Companies would remedy this problem only as to the areas served by these divested companies.

was adduced during the *AT&T* trial concerning the central role of Bell Laboratories — and to a lesser degree of Western Electric — in innovation in the telecommunications industry and, more broadly, in industrial research.[150] AT&T argued vigorously that the present structure of the Bell System was in significant part responsible for this admirable record because the researchers were linked with a manufacturer — Western Electric — and with two service organizations — the Operating Companies and the Long Lines Department.[151]

The Court is of the opinion that there is considerable merit to these contentions. Bell Laboratories has been a positive force both in basic and in applied research, and this research has had a beneficial effect on the nation's economic position in all of its varied aspects.[152] It also seems to be true that the links between Bell Laboratories and the manufacturing and service arms of the Bell System have been of assistance in the achievement of these technological successes.

On this basis, then, the separation of Bell Laboratories from all of these functions could have an adverse effect upon future research and development,[153] and it may for that reason be regarded as less desirable than the present proposal which would leave Bell Laboratories associated with a manufacturer and two service organizations — Long Lines and AT&T's new information services — which would supply the practical experience that would be useful in stimulating the research operations.

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[150] Testimony of Solomon Buchsbaum (September 23, 1981); testimony of Edward E. David, Jr. (November 4, 1981); testimony of David Packard (November 6, 1981); see also Exhibit D-1-134.

[151] Testimony of Morris Tanenbaum (September 8, 1981); testimony of William D. Nordhaus (November 5, 1981); testimony of Bruce C. Netschert (November 12, 1981); testimony of Paul R. Lawrence (November 6, 1981); testimony of Nathan Rosenberg (November 10, 1981).

[152] This includes basic scientific advance, cheaper and better products for consumers, foreign trade, and national defense.

[153] In light of AT&T's agreement to divest the Operating Companies, the predictions made by a number of eminent witnesses regarding the dire consequence certain to follow from such divestiture appear in retrospect to have been vastly overrated.

2. *Injunction*

The second major alternative to the proposed decree is an injunction which would be enforced by special masters appointed by and responsible to the Court. This alternative, too, suffers from a number of defects.

It would be difficult to formulate an order that would effectively deal with all of the different kinds of anticompetitive behavior that are claimed to have occurred over a considerable period of time, in various geographical areas, and with respect to many different subjects. There is evidence which suggests that AT&T's pattern during the last thirty years has been to shift from one anticompetitive activity to another, as various alternatives were foreclosed through the action of regulators or the courts or as a result of technological development.[154] In view of this background, it is unlikely that, realistically, an injunction could be drafted that would be both sufficiently detailed to bar specific anticompetitive conduct yet sufficiently broad to prevent the various conceivable kinds of behavior that AT&T might employ in the future.[155]

An even more formidable obstacle is presented by the question of enforcement. Two former chiefs of the FCC's Common Carrier Bureau, the agency charged with regulating AT&T, testified that the Commission is not and never has been capable of effective enforcement of the laws governing

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[154] It is claimed, for example, that after the legal defense against interconnection of non-Bell equipment became impossible to sustain, AT&T shifted to claims that inferior equipment was being produced by non-Bell manufacturers; alleged that harms to the network would result from such equipment; and sought regulation by state as distinguished from federal agencies, and the like. See Plaintiff's Memorandum in Opposition to Defendants' Motion for Involuntary Dismissal in the *AT&T* action at 296-359.

[155] For these reasons, and because of the enforcement problems discussed below, courts have generally rejected this type of detailed injunction in favor of the "surer, cleaner remedy of divestiture." *United States* v. *E. I. duPont de Nemours & Co.*, *supra*, 366 U.S. at 334. See also *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 165-75 (1948); *United States* v. *Crescent Amusement Co.*, *supra*, 323 U.S. at 189-90.

AT&T's behavior.[156] In their view, this inability was due to structural, budgetary, and financial deficiencies within the FCC as well as to the difficulty in obtaining information from AT&T. Whatever the true cause, it seems clear that the problems of supervision by a relatively poorly-financed, poorly-staffed government agency over a gigantic corporation with almost unlimited resources in funds and gifted personnel are no more likely to be overcome in the future than they were in the past.[157]

These difficulties would be exacerbated if enforcement of a broad injunction were vested in court-appointed special masters. To be sure, such officials have proved in the past to be capable of performing relatively narrow, short-term responsibilities, and to perform them well. But the type of broad injunctive relief that would be needed in these cases would require quasipermanent supervision of all of AT&T's activities by not one or two special masters but by a vast staff. In short, what would be required would be a re-creation of the FCC's Common Carrier Bureau in the guise of an arm of the Judiciary. Such a development would be undesirable for many different reasons.[158] Furthermore, there is no reason to believe that, in the end, a judicially-created bureaucracy would be any more capable than the FCC itself of performing the unending task of vigilance and oversight that would be required to ensure that an integrated Bell System did not engage in anticompetitive conduct.

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[156] Testimony of Walter Hinchman (June 18, 1981); testimony of Bernard Strassburg (October 14, 1981). Other persons with expertise in telecommunications regulation expressed similar views. Testimony of William Melody (June 8, 1981); testimony of Nina Cornell (June 19, 1981); testimony of Bruce Owen (June 22, 1981).

[157] Recent developments in governmental policy point to a further reduction in the funding, the authority, and hence the effectiveness of regulatory agencies such as the FCC.

[158] From a philosophical point of view, such a remedy could contravene the separation of powers doctrine because it would involve the creation of a substantial quasi-legislative, quasi-executive bureaucracy within the Judicial Branch of the government. Practically, the remedy could be impossible to administer because of the need for substantial budgetary authority and a large administrative apparatus.

D. Effect of the Divestiture Upon Other Interests

A number of individuals have written to the Court and to the Department of Justice urging the rejection of the proposed decree. They contend that AT&T in its present, integrated form has rendered excellent and affordable telephone service to the citizens of this nation, including those with modest incomes and those who live in sparsely populated areas. Many note that AT&T's securities have been a mainstay of the small investor, with a long history of stable prices and dividend payments. Given that record, the argument goes, the break-up of AT&T could not possibly be in the public interest. While the Court has very carefully considered these concerns,[159] it has concluded that they are not sufficient to overcome the considerations supporting divestiture.

The divestiture of the Operating Companies will not necessarily have an adverse effect upon the cost of local telephone service.[160] The decree would leave state and federal regulators with a mechanism — access charges — by which to require a subsidy from intercity service to local service. By means of these access charges, the regulators are free to maintain local rates at current levels or they may so set the charges as to increase or decrease local rates.[161]

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[159] Careful consideration and independent analysis have been particularly appropriate because these objections were primarily voiced by individual citizens who lacked the resources to present detailed briefs.

[160] There is a dispute, reflected at the trial as well as in other forums, over the question whether local telephone service has ever actually been subsidized by intercity service as AT&T has consistently claimed. See Testimony of John D. deButts (August 27, 1981); testimony of William J. Baumol (December 7, 1981). The government contended that, to the contrary, local telephone revenues have subsidized AT&T's intercity rates (see Testimony of William H. Melody (June 8, 1981); testimony of Nina Cornell (June 19, 1981); testimony of Bruce Owen (June 22, 1981)) and since the trial was aborted by the settlement, no final decision was reached on this issue.

[161] Although the decree requires the Operating Companies to file "cost justified" tariffs for access charges, it leaves to the regulators the decision as to what costs should be included within this calculation. Department of Justice Response to Comments at 106-107; AT&T Reply Brief at 22-23. If the regulators chose to retain the cost allocation presently used in the

As to the second claim, there is simply no evidence or reason to believe that, funding aside, the quality of service will decline as a result of divestiture. The divested Operating Companies will not be technical backwaters: they will have substantial incentives to upgrade their networks and to provide high-quality interconnections for other carriers in order to maximize revenues from access charges and from local rates.

As noted above, it is unlikely that the divestiture will impair the research capabilities of Bell Laboratories. See pp. 61–62 *supra*. The scientists and engineers working in that organization will retain their incentive to improve the equipment and technology used to provide local telephone service, if only because the largest potential customers of Western Electric — Bell Laboratories' companion in the "new" AT&T complex — will be the divested Operating Companies.[162] In addition, AT&T's information services and interexchange services can be provided to customers only over the Operating Companies' facilities, again creating large incentives for continued improvement and upgrading of these facilities.[163]

In the final analysis, it is apparent that, as with so many public issues, a choice must be made.

There has long been a debate over the relative merits of

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separations and settlements process, the subsidy from interexchange revenues to local rates will remain at current levels. Under the proposed decree, state regulators will set access charges for intrastate interexchange service and the FCC will set access charges for interstate interexchange service. Department of Justice Response to Comments at 106-107; AT&T Reply Brief at 22-23. If a subsidy is required beyond that implicit in the access charges, it may be provided by state or federal legislation. See, *e.g.*, H.R. 5158, 97th Cong, 2d Sess. § 234 (proposal for a National Telecommunications Fund).

[162] Indeed, their incentive may be even greater after divestiture than it was before, since after divestiture Western Electric will have lost its anticompetitive advantage and will instead be forced to compete with other manufacturers on the basis of quality and price for the Operating Companies' business.

[163] The concerns of investors are similarly unfounded. They will retain all their legal remedies for any improper actions by AT&T in connection with the divestiture. See Part IX *infra*.

regulation and competition. The evidence adduced during the *AT&T* trial indicates that the Bell System has been neither effectively regulated nor fully subjected to true competition. The FCC officials themselves acknowledge that their regulation has been woefully inadequate to cope with a company of AT&T's scope, wealth, and power. The efforts of various arms of government to introduce true competition into the telecommunications industry have been similarly feeble. The antitrust suit brought by the Department of Justice in 1949 ended in 1956 with a consent decree which imposed injunctive relief that was patently inadequate. It took from 1968 when the *Carterfone* decision[164] was handed down by the FCC to 1978 when the United States Court of Appeals decided *Execunet II*[165] to establish even the very principle of competition so that it was beyond dispute. Future regulatory and injunctive remedies are unlikely to be more successful than were similar efforts in the past. In short, the choice is between a Bell System restrained by neither regulation nor true competition and a Bell System reorganized in such a way as to diminish greatly the possibility of future anticompetitive behavior.

The history of the American economic system teaches that fair competition is more likely to benefit all, especially consumers, than an industry dominated by a single-company monopolist. There is no reason to believe that the experience of the telecommunications industry will be contrary to that rule.

For all of these reasons, the Court concludes that the divestiture from AT&T of companies providing local telephone service is in the public interest.

V

Absence of Restrictions on AT&T

Under the terms of the proposed decree, the line of business restrictions and the licensing requirements imposed by the

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[164] 13 F.C.C.2d 420 (1968).

[165] *MCI Telecommunications Corp.* v. *FCC*, 580 F.2d 590 (D.C. Cir. 1978).

1956 consent decree in the *Western Electric* case would be removed and AT&T would be free to compete in all facets of the marketplace.[166] Some of the opponents of the proposed decree argue that several of the restrictions contained in the 1956 decree should not be eliminated, and others contend that the Court should also impose additional restrictions, not present in the 1956 decree. For the reasons explained in this part of the opinion and Part VI below,[167] the Court finds that, with one exception (see Part VI(B) *infra*), the imposition of restrictions on AT&T would not be in the public interest.

The antitrust laws do not require that a company be prohibited from competing in a market unless it can be demonstrated that its participation in that market will have anticompetitive effects. Past restrictions on AT&T were justified because of its control over the local Operating Companies. With the divestiture of these local exchange monopolies, continued restrictions are not required unless justified by some other rationale.

A. AT&T Power in the Interexchange Market

Virtually all those who suggest that restrictions beyond those in the proposed decree be imposed on AT&T make the same general arguments. Their basic claim is that AT&T still possesses monopoly power in the interexchange market[168] and that it will leverage this power by cross subsidizing its competitive services with monopoly revenues.[169] These interexchange monopoly revenues, it is said, will subsidize a

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[166] The only limitation regarding AT&T's business activities is that it may not reacquire the Operating Companies.

[167] This part of the opinion considers general restrictions on AT&T; Part VI deals with restrictions on the provision of information services.

[168] See Part V(C) for a discussion of the claim that AT&T has monopoly power in the equipment manufacturing market.

[169] In addition to advancing the cross-subsidization argument, those who advocate restrictions on AT&T also raise contentions based on discrimination. However, because these discrimination claims take on a variety of forms dependent on the context, the Court will address them in its discussion of the specific restrictions that have been proposed.

variety of business activities, ranging from competitive interexchange routes to equipment manufacturing to alternative local distribution facilities.

The validity of these arguments depends, of course, upon the soundness of the claim that after the divestiture AT&T will still possess monopoly power in the interexchange market. If AT&T lacks such power, it would be unable to reap supracompetitive profits with which to support its other activities; it would only recover a profit commensurate with its interexchange operations.

There can be no doubt that AT&T's market share in the interexchange market is high. Although it is not possible to focus on a precise figure inasmuch as the number of market share estimates is almost as varied as the number of persons submitting comments, even AT&T concedes that as late as 1981 its share of interexchange revenue was around 77 percent.[170] But the inquiry of whether AT&T possesses monopoly power in the interexchange areas does not end with a description of AT&T's size or its market share.

As defined by the Supreme Court, monopoly power is "the power to control prices or exclude competition." *United States* v. *Grinnell Corp., supra*, 384 U.S. at 571 (1966); *United States* v. *duPont & Co.*, 351 U.S. 377, 391 (1956). Although monopoly power may be inferred from a firm's predominant share of the market, size alone is not synonymous with market power, particularly where entry barriers are not substantial. *United States* v. *Grinnell, supra*, 384 U.S. at 571; *United States* v. *AT&T, supra*, 524 F. Supp. at 1347; Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 947-51 (1981).

Both the Department of Justice and AT&T contend that competition in the interexchange market is growing and that

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[170] Estimates submitted by others were significantly higher, some contending that AT&T's market share exceeds 90 percent. It is unnecessary for purposes of this proceeding to resolve the conflict, for the precise amount of the market share is not decisive to the Court's holding.

this increase in competition demonstrates an absence of monopoly power.[171] There is some validity to this claim. The interexchange market is now being served not only by relatively young businesses but also by subsidiaries of such well established firms as ITT, Southern Pacific, and IBM.

That is not to say, however, that competition has flourished without impediment or that it would soar if the Bell System were not broken up. There is substantial merit in the suggestion that, absent divestiture, AT&T would still possess significant monopoly power, and that whatever competition developed in the past did so despite anticompetitive conditions. See Part IV *supra*. But the overriding fact is that the principal means by which AT&T has maintained monopoly power in telecommunications has been its control of the Operating Companies with their strategic bottleneck position. The divestiture required by the proposed decree will thus remove the two main barriers that previously deterred firms from entering or competing effectively in the interexchange market.

First, AT&T will no longer have the opportunity to provide discriminatory interconnection to competitors. The Operating Companies will own the local exchange facilities. Since these companies will not be providing interexchange services, they will lack AT&T's incentive to discriminate. Moreover, they will be required to provide all interexchange carriers with exchange access that is "equal in type, quality, and price to that provided to AT&T and its affiliates." Proposed Decree, Section II. See Part VIII *infra*.

Second. Once AT&T is divested of the local Operating Companies, it will be unable either to subsidize the prices of its interexchange service with revenues from local exchange services or to shift costs from competitive interexchange services.

With the removal by the decree of all these burdens on competition, the number of firms entering the interexchange

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[171] The Department took a contrary position during the *AT&T* trial.

market is thus likely to increase.[172] This development should be further assisted by the reduction of other barriers to entry. For example, although the cost of entering the telecommunications business is still substantial, the size of the required capital investment is not as great as it once was.[173] In addition, as more competitors begin to offer more services that are comparable to those offered by AT&T,[174] entrenched customer preferences in favor of AT&T will decrease.

With the removal of these barriers to competition, AT&T should be unable to engage in monopoly pricing in any market. To be sure, there are a number of routes for which AT&T is

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[172] It must be remembered that the regulatory decisions which introduced competition into the interexchange market are themselves relatively recent. It was not until 1978 that the provision of regular long distance telephone service (*i.e.*, MTS/WATS type service) became subject to competition. For a survey of the decisions leading to full competition in the interexchange market, see Docket 11866, *Allocation of the Frequencies in the Bands Above 890 Mc.*, 27 F.C.C. 359 (1959); Docket 16509, *Microwave Communications, Inc.*, 18 F.C.C.2d 953 (1969), 21 F.C.C.2d 190 (1970); Docket 18920, *Specialized Common Carriers*, 29 F.C.C.2d 870 (1971), *aff'd sub. nom. Washington Utilities and Transportation Commission* v. *F.C.C.*, 513 F.2d 1142 (9th Cir. 1975); Docket 16495, *Establishment of Domestic Communications Satellite Facilities by Non-Governmental Entities*, 35 F.C.C.2d 844 (1972); *MCI Telecommunications Corp.* v. *FCC*, 561 F.2d 365 (D.C. Cir. 1977) (*Execunet I*); *MCI Telecommunications Corp.* v. *F.C.C.*, 580 F.2d 590 (D.C. Cir. 1978) (*Execunet II*). The FCC decisions allowing interexchange carriers to expand their service offerings by reselling and sharing AT&T services have likewise been in force only for the last several years. *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services*, 60 F.C.C.2d 261 (1976), *reconsidered*, 62 F.C.C.2d 588 (1977), *aff'd. sub. nom. AT&T* v. *F.C.C.*, 572 F.2d 17 (2d Cir. 1978); *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services*, Docket No. CC 80-54, 83 F.C.C.2d 167 (1981).

[173] This reduction in the amount of capital investment is due in part to the development of new technologies, such as satellites and microwave towers, and in part to the recent regulatory decisions allowing for the resale and sharing of AT&T services. See note 172, *supra*.

[174] See, e.g., *MCI* v. *FCC*, 561 F.2d 365 (D.C. Cir. 1977); *MCI* v. *FCC*, 580 F.2d 590 (D.C. Cir. 1978); *MTS & WATS Market Structure*, CC Docket 78-72, Report & 3rd Supplemental Notice of Inquiry and Proposed Rulemaking, 81 F.C.C.2d 177 (1980).

the sole interexchange carrier. However, several of these routes serve sparsely populated areas and are only marginally profitable. On the other hand, should it turn out that these routes are in fact lucrative and that AT&T is nevertheless charging monopoly prices, then, following divestiture, market forces should fairly rapidly remedy the situation: because of the elimination of entry barriers, new entrants will be attracted to these markets, and prices, in turn, will fall to their competitive levels.

For these reasons, it appears that after divestiture, AT&T will largely lack the monopoly power that the opponents of the decree suggest,[175] and the trend of increasing competition may therefore be expected to continue.[176]

Thus, unless proposed restrictions on AT&T are premised on more than the claim that AT&T has monopoly power in the interexchange area, they will have to be rejected.

B. Interexchange Restrictions

Some of those who have commented on the proposed decree[177] urge that the Court require a modification which would add a clause guaranteeing access to AT&T's interexchange network for its competitors, and another which would require AT&T's Long Lines Department to be placed in a fully separated subsidiary. The imposition of such modifications is not warranted.

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[175] The Court does not find that there is *no* possibility that AT&T will use its still considerable market share in an anticompetitive manner. It does find, however, that for the reasons cited, both the incentive and the opportunity for anticompetitive conduct will after divestiture and on account of divestiture be greatly reduced.

[176] To the extent that AT&T still has some potential for engaging in anticompetitive behavior, there is of course nothing in the proposed decree to immunize it from its obligations under the regulatory decisions or the antitrust laws.

[177] Most of those who have submitted briefs or comments — including AT&T's most major interexchange competitors (*e.g.*, MCI Corp.) — either did not address the subject of restrictions on AT&T at all or they agreed with the decree's provisions as drafted.

Those who argue for these restrictions essentially cite no reason other than AT&T's share in the interexchange market to support their demands and, as discussed *supra*, that alone is insufficient.

Additionally, the proposed restrictions are substantively deficient. As the proponents of a clause which would guarantee access to AT&T's interexchange competitors concede,[178] such access is already required by existing FCC decisions and regulations. These regulations make it possible for competing carriers to interconnect freely and to expand their facilities by "piecing out" AT&T's network, that is, by using AT&T's facilities to complete portions of routes that must traverse low density, sparsely populated, and hence presumably not very profitable territory. See note 172 *supra*. There is no basis for simply repeating in the decree[179] precisely that which is already contained in the FCC regulations.

The second proposed restriction — that Long Lines be placed in a separate subsidiary — is likewise unsupported either by necessity or by adequate reasoning. This restriction is required, it is said, to prevent AT&T from using its interexchange revenues to subsidize its competitive services. But as the Court has stated elsewhere (see Part VII *infra*), if cross subsidization is a problem, a separate subsidiary will not resolve it. Moreover, AT&T's opportunity for any cross subsidization will become increasingly curtailed as interexchange competition increases; excessive profits from that service with which to subsidize other activities would quickly

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[178] *E.g.*, Topic 3 briefs submitted by Association of Data Communications Users and the Utilities Telecommunications Council at 11; Mobile Marine Radio Inc. at 10; and Satellite Business Systems at 17.

[179] Such duplication might actually have its drawbacks, for it would make it impossible to alter the present requirements should they no longer appear to be in the public interest; (*i.e.*, should the FCC find that, because conditions had become more competitive, the present interconnection requirements are no longer warranted). With the divestiture of the Operating Companies, regulation of interexchange services will in all probability become more effective since AT&T will no longer be able to shift costs in the manner that the government has alleged it has done in the past.

attract lower-priced competitors into the interexchange field or stimulate existing competitors into expanding their networks to displace AT&T.

For these reasons, the proposed interexchange restrictions must be rejected.

C. Equipment Restrictions

The restrictions that are suggested in the area of equipment manufacturing are of three basic types: that AT&T's equipment manufacturing and marketing operations be placed in a separate subsidiary or even, in the view of some of those who submitted comments, divested;[180] that AT&T be required to disseminate its network standards and technical information; and that procurement quotas be imposed on the Operation Companies and on AT&T's Long Lines Department.

In addition to justifying these restrictions on the basis discussed above — that is, on AT&T's interexchange market share — their proponents support their position on two other grounds: that AT&T possesses monopoly power in the equipment market, and that the association with Bell Laboratories and Long Lines provides Western Electric with anticompetitive advantages in the manufacturing of equipment. The Court will examine each of the arguments in turn.

There is no merit to the claim that after divestiture AT&T will possess monopoly power in the area of equipment manufacturing. In reviewing the proof on anticompetitive behavior in the equipment market — even before divestiture — the Court found that the government's evidence on that aspect of the case was less convincing than, for example, on that involving intercity services. As explained in Part IV *supra*, where the government was able to show that AT&T's market share was high, it was generally unable to demonstrate significant anticompetitive behavior; where evidence of behavior was more damning, it had difficulty establishing market power. Thus, at a minimum the factual predicate for drastic

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[180] Additional reasons for a rejection of this proposal are discussed in Part IV *supra*.

restrictions in the equipment area is not as apparent as it might be with respect to other subjects.

After divestiture, AT&T's position in the equipment market will be further diminished, and that market is certain to become more competitive.[181] To the extent that prior to divestiture AT&T was able to engage in anticompetitive conduct in the equipment market, that ability stemmed basically from its control of the Operating Companies. Once these local companies are divested, Western Electric will lose its captive customers. Not only does the proposed decree eliminate the Operating Companies' intra-enterprise incentive to purchase Western Electric equipment, but it also includes specific provisions that prohibit these companies from discriminating in the procurement of equipment. One of these provisions requires that within six months after the reorganization of AT&T, each Operating Company must submit to the Department of Justice compliance procedures explaining how that company plans to carry out its equipment procurement obligations. Proposed Decree, Sections II(B) and (C). If an Operating Company discriminates in procuring equipment, that act will constitute a violation of the decree, and an enforcement action may be brought against it.

There is likewise no merit to the argument that Western Electric will have an anticompetitive edge in the production of new equipment because its affiliation with Bell Laboratories and Long Lines will give it early access to technical information and network standards. This claim ignores the fact that after divestiture, the Operating Companies, not AT&T, will control the information necessary for local exchange and exchange access services. Thus, if equipment manufacturers need information about interconnecting their equipment to

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[181] In the interexchange equipment market, for example, Western Electric has a variety of competitors which produce switches and microwave equipment. In the area of equipment manufacturing for computers and computer-related services, far from being the dominant firm, Western Electric will be a new entrant forced to compete with well established domestic and foreign firms.

the local exchange network, it will be provided by companies that are not engaged in the manufacturing of equipment.[182]

There is no competitive basis, therefore, for imposing any of the proposed restrictions on AT&T in the area of equipment manufacturing and marketing.[183]

D. Bypass

A considerable number of persons[184] have suggested that the Court prohibit AT&T from using new local distribution technologies that would allow it to "bypass" the networks of the Operating Companies to reach its local subscribers directly.[185] The fear is that, early on, use of this technology will tend to exert pressure on Operating Companies rates and their ability to levy access charges on interexchange carriers, and that, in time, the new technology will render the Operating Companies and their plant obsolete.

The suggestions for a modification to prohibit bypass would be worthy of implementation only if two premises were

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[182] To the extent that manufacturers need information from Long Lines, market forces will help to ensure their access: since Long Lines will increasingly be forced to compete with other interexchange competitors, it will have the incentive to purchase the best equipment at the lowest prices without regard to corporate affiliation. It will therefore be in Long Line's own interest to disseminate its own technical information and standards as broadly as possible to enable it to choose among the widest range of products. Finally, as technology in interexchange services advances and carriers turn increasingly to the use of microwave towers and satellites, reliance on the AT&T network will decline and the need for obtaining information about the AT&T network will increasingly be reduced.

[183] Far from enhancing competition, the establishment of quotas would produce anticompetitive results: the Operating Companies and Long Lines would be precluded from making purchasing decisions on the basis of quality and price.

[184] Including the members of the House Telecommunications Subcommittee of the House Committee on Energy and Commerce who wrote to the Court on July 27, 1982. See note 63 *supra*.

[185] Initially, this capacity would presumably be used primarily to connect to high-volume users; eventually the bypass technology may permit interconnection to all subscribers.

accepted: (1) that if AT&T does not develop the technology required for bypass, it will not be developed by anyone, and (2) that it is desirable as a matter of public policy to curtail this technological development. Neither premise is well taken.

AT&T is not the only carrier to possess the technical know-how necessary for bypassing the Operating Companies' local networks. Imposition of this restriction on AT&T is thus unlikely to be effective.[186] Furthermore, because other inter-exchange carriers possess this technology, to prohibit only AT&T from developing and using it would artifically and unfairly restrict competition — an action antithetical to the purposes of the antitrust laws.[187]

Even if the Court, by a simple modification of the decree, could stop bypass technology from developing, it would not be justified in doing so. This technology is a threat to the Operating Companies presumably because, when it is developed, it will be more advanced and less expensive than the present method of transmission which depends upon a cumbersome system of poles and wires. Bypass would provide telecommunications service directly to the subscriber by means of satellites, microwave towers, or other advanced technological innovations at a lower cost than such service is available now. If indeed this should prove to be the case — there is general agreement that truly large-scale use of bypass technology is still some time into the future — the answer is not to call a halt to these developments but to make certain

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[186] Indeed, the protection afforded by a ban on AT&T alone would probably be minimal because it is the carrier least likely to exploit the new technology to the fullest inasmuch as its facilities were designed to interconnect with those of the Operating Companies. Moreover, there is a safety valve against overreaching: before AT&T, or any other carrier, may install the facilities necessary to connect directly to the ultimate customers, it must secure approval from the state regulators. If these regulators find for public interest reasons unrelated to competition that bypass should be prohibited, they may do so irrespective of the decree in these cases.

[187] To the extent that the local exchange facilities constitute monopoly bottlenecks, the development of alternative facilities actually furthers the competitive purposes of these laws.

that the benefits will not be distributed in such a way as to undermine the goal of universal service.

Neither the Court nor those who object to the decree can halt the electronic revolution any more than the Luddites could stop the industrial revolution at the beginning of the last century. If and when bypass technology becomes technically and economically feasible for widespread use, it should have the effect of reducing telephone costs and charges across the board, to the benefit of consumers, the economy, and the nation. Should it turn out instead that, as some fear, this technology will be used to reduce charges unevenly so as to threaten the goal of universal service, then those with legislative authority may at that time wish to take steps, through a program of subsidies, special charges, or other regulatory means, to make the benefits of the new technology available to all, including those who are relatively low-volume users of telephone service. But there is no warrant for preventing the development of this technology through a ban on its use by AT&T or otherwise.

E. Patent Licensing Requirements

Under the terms of the 1956 consent decree, AT&T was required to grant to all applicants non-exclusive licenses for all existing and future Bell System patents. 1956 Consent Decree, Section X. In addition, the decree requires that, upon the payment of reasonable charges, AT&T must furnish to those with licenses for AT&T patents the technical information necessary to manufacture the equipment for which the applicant obtained the patent license. Section XIV. These licensing requirements[188] would be eliminated by the proposed decree, and the Court must determine whether such elimination is in the public interest.

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[188] The proposed decree does nothing to affect existing licensing contracts, most of which last for the life of the patent and contain provisions for the licensing of related new patents issued within five years of the execution of the contract. In addition, licenses held by the Operating Companies may be sublicensed to others.

A prime reason for the imposition of the mandatory licensing requirement in 1956 was AT&T's anticompetitive hold on telecommunications and electronics technology.[189] But this technology has advanced rapidly since then, and has become much more widely dispersed, so that AT&T now faces significant challenges in research and development both from established domestic firms and from powerful foreign competitors. The need for continued compulsory licensing of patents, therefore, is diminished on this basis alone.

Divestiture of the Operating Companies may be expected vastly to accelerate this trend. Until now, AT&T's research and development have been financed primarily through the licensing contracts with the local Operating Companies. As long as rate-payer-financed local exchange revenues were supporting this research and development, it made sense to require AT&T to share the fruits of its monopoly financing with others. But under the proposed decree, the licensing contracts will be terminated, and this rationale for exclusive licensing thus falls.

Moreover, AT&T would be forced after divestiture to fund its research and development just like other competitive enterprises — without an artificial subsidy from captive ratepayers. That being so, unless compulsory licensing is eliminated, AT&T would be placed at a significant disadvantage vis-a-vis its competitors: of all those who would be active in the development of new technology, it alone would be compelled to furnish its patents to those who might be interested,[190] including all of its domestic and foreign competitors.[191]

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[189] The complaint in the *Western Electric* action alleged that AT&T engaged in anticompetitive behavior in licensing its own patents and in acquiring the patents of others as part of its efforts to monopolize the telecommunications equipment market. *United States* v. *Western Electric*, *supra*, Complaint at 18–19. The 1956 consent decree contains no finding of patent abuse, but simply states that the terms of the judgment are consented to "without . . . constituting any evidence or admission by any party in respect of any such issues." 1956 Consent Decree at 1.

[190] At the same time, AT&T's new-found need to finance its research and development like other competitive firms will exert some pressure on it to

Some of AT&T's competitors contend next that compulsory licensing is necessary to ensure that equipment manufacturers and interexchange carriers receive the interface information necessary to interconnect with the local exchange network. There is no basis for such claims. As stated in Part V(C) *supra*, after the divestiture, the local Operating Companies, not AT&T, will possess and generate the information necessary for interconnection. The proposed decree requires AT&T to provide these Operating Companies with, *inter alia*, sufficient technical information to permit them to perform their exchange telecommunications and exchange access functions. Proposed Decree, Section I(A)(1). The Operating Companies, in turn, are prohibited from discriminating in the "establishment and dissemination of technical information and procurement and interconnection standards." Section II(B)(2).[192] And since the Operating Companies will neither manufacture equipment nor provide interexchange services, they will have no incentive to favor Western Electric or Long Lines to the detriment of other intercity service providers and equipment manufacturers.

For these reasons, the Court concludes that the provisions in the proposed decree which would eliminate the patent licensing provisions imposed in 1956 are not inconsistent with the public interest.[193]

Somewhat different considerations apply to licensing relationships between AT&T and the local Operating Companies.

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license its patents to others so that, reciprocally, it may receive patents and technical information from them.

[191] Indeed, this disadvantage could discourage AT&T from spending funds for research and development. The resulting diminution of Bell Laboratories' research effort would not be in the public interest. See Part IV *supra*.

[192] In addition, the FCC requires the Operating Companies to make available network interface information necessary for interconnection. See, *e.g.*, 47 C.F.R. § 68.110.

[193] Should AT&T misuse its patents — for example by improperly refusing to license them — the aggrieved parties would be free to pursue their remedies under the patent and antitrust laws: there is nothing in the decree to diminish any of these rights and remedies.

These companies have not only relied on the research of Bell Laboratories; through the licensing contracts they have provided direct financial support for that research. In addition, access to the patents and technical information owned by AT&T is necessary if the Operating Companies are to perform properly their exchange telecommunications and access functions. For these reasons, the Court would be reluctant to approve the proposed decree were the Operating Companies to be spun off without patent and research resources. That, however, is not the case.

Under the terms of the proposed decree, the Operating Companies must be given the technical information needed to perform their functions. Proposed Decree, Section I(A)(1).[194] As part of its compliance with this requirement, AT&T has proposed granting to the Operating Companies on a royalty-free basis, all existing patents and all patents issued for a period of five years following approval of the proposed decree. See, *e.g.*, AT&T Reply Comments at 123. AT&T has also agreed to provide the Operating Companies with non-patentable technical information that has been funded by the license contracts. Specifically, it has stated (AT&T Reply Comments at 123–34, n. **):

> To the extent License Contract work in progress upon the date of divestiture yields useful technical information thereafter, such information shall also be made available to the BOCs for an appropriate period after divestiture. In addition, technical information concerning Western Electric products and systems will be made available to the extent necessary for the BOCs to procure, or otherwise contract for, compatible equipment and systems from other manufacturers.

Finally, the parties have assured the Court that the Operating Companies will have the right to sublicense the AT&T patents and technical information to those providing them with goods

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[194] In addition, until September 1, 1987, the Operating Companies may call upon AT&T, Western Electric, and Bell Laboratories to provide "on a priority basis all research, development, manufacturing, and other support services." Proposed Decree, Section I(C).

and services. See, *e.g.*, Department of Justice Response to Comments at 38–39.

These representations are adequate to support the conclusion that the Operating Companies will possess the necessary patent and technical information resources. The assurances must, of course, be implemented by means of appropriate details in the reorganization plan, and when that plan is submitted pursuant to the procedures set forth in Part XI *infra*, the Court will evaluate these details to make certain that they conform to the general principles implied by these assurances.

VI

The 1956 Decree and Line of Business Restrictions

The basic agreement embodied in the 1956 consent decree in the *Western Electric* case[195] was that AT&T would not be required to divest itself of Western Electric, provided that AT&T would restrict its operations to the provision of common carrier communications services[196] and that Western Electric would manufacture only the types of equipment used by the Bell System.[197]

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[195] See Part I *supra*.

[196] Section V of the 1956 decree provides,

> [t]he defendant AT&T is enjoined and restrained from engaging, either directly, or indirectly through its subsidiaries . . . in any business other than the furnishing of common carrier communications services; provided, however, that this Section V shall not apply to . . . businesses or services incidental to the furnishing by AT&T or such subsidiaries of common carrier communications services.

Under Section II(i) of the 1956 decree, common carrier communications services are defined as "communications services and facilities, . . . the charges for which are subject to public regulation under the Communications Act of 1934."

[197] Section IV of the 1956 decree states that

> [t]he defendants are each enjoined and restrained from commencing, directly or indirectly, to manufacture for sale or lease any equipment which is of a type not sold or leased . . . to Companies of the Bell System, for use in furnishing common carrier communications services.

The decree which has now been submitted by the parties would eliminate all of the restrictions of the 1956 consent judgment. If that decree is entered by the Court, AT&T would be free to enter the computer market as well as to provide the full range of so-called information services.[198]

There has been no serious opposition to the entry of AT&T into manufacturing and marketing of computers and other electronic equipment, and there is no question that this

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[198] Although the Court need not at this juncture decide the question whether AT&T could provide any of these information services were the 1956 consent decree to remain in effect, it would appear that, unless that decree is vacated, AT&T would be precluded from offering most, if not all, of these services. Specifically, it is difficult to imagine how the Court could find either (1) that the provision of computer services or electronic news services in competition with others satisfies the 1956 decree's requirements that AT&T provide only common carrier communications services the charges for which are subject to public regulation under the Communications Act or (2) that these services are "incidental" to the furnishing of common carrier communications services.

Similarly, it appears that under the 1956 decree, AT&T would be precluded from offering the services described in the FCC's *Computer II* decision. In that decision, the FCC ruled that AT&T could offer so-called "enhanced services" (which are essentially the equivalent of the "information services" described in the proposed decree), and customer premises equipment on a nontariffed competitive basis, provided that AT&T does so through a fully separate subsidiary. The Commission's decision simply means that AT&T is authorized, as opposed to required, to offer these services *under the Communications Act;* it does not relieve AT&T of its obligations under the *antitrust laws*, and more specifically under the 1956 decree. (The Commission's decision is presently on review — see *Computer & Communications Industry Ass'n* v. *FCC*, D.C. Civ. No. 80-1471 (filed May 15, 1981) — but the appeal does not alter the underlying legal effect of the Commission's decision in relation to the action before this Court.)

Finally, it should be noted that, if presented with the issue of whether AT&T is precluded by the 1956 decree from offering these non-tariffed competitive services permitted under *Computer II*, this Court would be deciding that issue *de novo*, because the opinion and order issued by Judge Biunno construing the decree to permit AT&T to offer these services has been vacated by order of the Court of Appeals for the Third Circuit. See *United States* v. *Western Electric Co.*, No. 81-1960 (3rd Cir. Feb. 2, 1982); *United States* v. *Western Electric Co.*, No. 49–17 (D.N.J. March 12, 1982).

development would be in the public interest.[199] It will accordingly be approved. By contrast, others who have submitted comments object to AT&T's entry into the information services market.

"Information services" are defined in the proposed decree at Section IV(J) as:

> the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information which may be conveyed via telecommunications. . . .

Two distinctly different types of information services fall within this general category: services which would involve no control by AT&T over the content of the information other than for transmission purposes (such as the traditional data processing services), and services in which AT&T would control both the transmission of the information and its content (such as news or entertainment). Because these two types of services raise different concerns, they will be addressed separately.

A. Data Processing and Other Computer-Related Services

As technology has advanced, the line between communications and data processing has become blurred. Advances

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[199] Without control of the local exchange monopolies, AT&T will have no improper advantage over other competitors. See Part IV(B) *supra*. It will not be able to subsidize its offerings with monopoly profits in the interexchange or telecommunications equipment markets (see Part V, *supra*) and there is little likelihood of customer discrimination because these products and services, unlike information services, are not closely dependent upon access to the telecommunications network.

If a potential competitor poses no threat to the development of a healthy competitive market it should obviously not be barred from entering that market. The greater the number of competitors, the more likely it is that consumers will reap the benefits of lower prices and product improvements. AT&T is likely to be an especially potent competitor given its manufacturing expertise and the resources of Bell Laboratories.

in communications technology, for example, now allow otherwise incompatible computers to converse with each other. New sophisticated telephone equipment located on a customer's premises not only performs switching and call routing functions but it also retrieves information much as does a traditional computer. Even ordinary telephones may be capable of performing functions that formerly required the support of a separate computer.[200]

Providers of data processing services — like others who have commented on the decree in other contexts — contend that AT&T should be prohibited from entering these fields because of its market power in the area of interexchange services. Shaping the argument to support their particular interests, these persons contend that AT&T will use the monopoly profits from its interexchange services to subsidize its computer-related services, and that it will use its control over the interexchange network to discriminate against other data processing competitors in providing access to that network.

As explained in Part V *supra*, there is little possibility that AT&T will be able to use its revenues from the interexchange market to subsidize its prices for computer services. That being true, AT&T would not possess any anticompetitive advantages over competitors on this basis, and the possibility of cross subsidization as a basis for rejecting this portion of the proposed decree may therefore be completely discounted.

The discrimination argument is slightly more serious. Since AT&T will be offering its own computer-related services, it may well have an incentive to discriminate in transmitting competitors' services. But what defeats the objections is that AT&T's actual ability to discriminate is quite remote. This segment of the information services industry is already well

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[200] Other examples of these services include AT&T's Custom Calling II (which allows advance calling and call answering), telephone-operated burglar alarm systems, and office management systems (which may provide such diverse functions as inventory control, temperature control, and interoffice data communications).

established, comprised of some of the nation's leading corporate giants, as well as many smaller concerns. The FCC has found that "[t]here are literally thousands of unregulated computer service vendors offering competing services connected to the interstate telecommunications network." *Computer II*, *supra*, 77 F.C.C.2d at 426. These strongly competitive conditions will limit AT&T's ability to practice discrimination in two ways. First, AT&T's competitors will have the economic resources necessary to combat any attempt at discrimination. Second, the growing demand for information services will necessarily increase the demand for transmission facilities for these services. Such an increase in demand is likely to stimulate AT&T's interexchange competitors to offer satisfactory alternatives to the AT&T network,[201] and any attempt by AT&T to discriminate would only further enhance this eventuality.

This fairly limited possibility of discrimination clearly does not outweigh the substantial advantages to the public that would be gained by allowing AT&T to develop this new technology. AT&T's entry into these technologically sophisticated fields will stimulate competition, and it is therefore likely to produce further technological advances, new products, and better services—all of which are likely to benefit the American consumer, American foreign trade, and national defense.

Since AT&T's participation in these areas will foster the traditional objectives of the Sherman Act and is not likely to lead to anticompetitive practices,[202] the Court will not sustain the objections to this aspect of the proposed decree.[203]

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[201] Indeed, some of the providers of these information services may themselves have the resources to construct such transmission systems.

[202] Absent the divestiture of the Operating Companies, that conclusion might, of course, be quite different.

[203] For the reasons stated in Part VII *supra*, the Court also rejects the suggestion that AT&T be required to offer these services through a separate subsidiary.

B. Electronic Publishing Services[204]

The second type of information service which AT&T would be permitted to provide under the proposed decree are those services in which it would control, or have a financial interest in, the content of the information being transmitted. Those services are generally referred to as electronic publishing or information publishing services.[205]

A number of organizations have objected to entry of the proposed decree unless it is modified to include a ban on electronic publishing. However, the decree itself does not specifically refer to the concept of electronic publishing, let alone provide a suitable definition. In order to conduct a meaningful discussion of the relevant issues, therefore, electronic publishing must first be defined. After drawing on various sources,[206] the Court has concluded that, for purposes of this opinion, electronic publishing[207] will be regarded as:

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[204] The discussion of electronic publishing under the topic heading "1956 Consent Decree and Line of Business Restrictions" is for the sake of convenience only. The Court's decision — that permitting AT&T to become an electronic publisher is not in the public interest — was made solely on the basis of the proposed decree here under review and without consideration of whether AT&T could offer these services under the terms of the 1956 decree. But see note 198 *supra*.

[205] For purposes of this discussion, the Court will use the term electronic publishing. Use of this term is not meant to imply a limitation to a particular kind of transmission technology.

[206] The kinds of services here under review have been discussed under a variety of labels in a number of forums. The telecommunications bill introduced in the House of Representatives, for example, used the term "information publishing service" which was defined as:

> provision to any unaffiliated person of any information —
>
> (A) which the publisher has (or has caused to be) authored, originated, gathered, collected, produced, compiled, edited, categorized, or indexed; or
>
> (B) in which the publisher has a direct or indirect financial or proprietary interest.

H.R. 5158, 97th Cong., 1st Sess. § 263(f)(3) (1982). (The bill was withdrawn by Congressman Wirth on July 20, 1982).

A Senate bill on the same subject referred to "cable service" and "mass media services." The former term was defined as "the retransmission of

> the provision of any information which a provider or publisher has, or has caused to be originated, authored, compiled, collected, or edited, or in which he has a direct or indirect financial or proprietary interest, and which is disseminated to an unaffiliated person through some electronic means.[206]

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any television or radio broadcasting signal, or program origination, for distribution by cable or any other closed transmission medium to multiple subscribers who pay to receive such service." Mass media services were defined as follows:

> The term 'mass media' includes television and radio broadcasting, pay television, and printed or electronic publications (including newspapers, periodicals, and any service or product like or similar to a newspaper or periodical). Such term does not include —
>
> (A) telephone number or address listings and directory assistance (limited to telephone number, address, and business category);
>
> (B) weather, time, or sports information;
>
> (C) any information service which AT&T or any affiliate was engaged in on April 7, 1981; or
>
> (D) printed or electronic directory advertising.

S. 898, 97th Cong., 1st Sess. § 229(f) (1981).

Some persons who have commented in this proceeding have urged the Court to adopt the definition used in H.R. 5158; others have proposed their own definition. The National Association of Broadcasters, et al. (Topic 6 Brief at 2), for example, urges that electronic publishing be defined as

> the provision of any information which the provider (the publisher), has, or has caused to be, originated, created, compiled, produced or selected, and which is intended for members of the public and is distributed via electronic means.

[207] In addition to the one-way dissemination of information that is the norm in print publishing, electronic publishing also includes interactive transaction services. These services allow a consumer not only to receive information at home but also to send information back to the publisher. Thus, consumers using a "shop-at-home" service, for example, could use their home terminals to call up information on products being offered by a particular merchant, and then place their orders for the desired products by using their terminals to key in the necessary ordering information.

[208] The kinds of information referred to in this definition include news, business and financial reports, editorials, columns, sports, features, and electronic advertising. The means of transmission include pay television, radio and television broadcasting, and electronic publications which appear either by audio means, on video screens, or in printed form. But see note 223 *infra*. See also S. Rep. No. 97-170, 97th Cong., 1st Sess. 42-44 (1981).

A number of persons have argued that because of potential dangers to competition and to First Amendment values, AT&T should be prohibited from engaging in such activities. For the reasons stated below, the Court agrees.

The threat to competition that is claimed to be posed by AT&T in this industry is that, through the use of cross-subsidization and customer discrimination, it will use its power in the interexchange market to disadvantage competing electronic publishers.[209] While the possibility of cross-subsidization is as remote here as it is with respect to other subjects considered herein,[210] there is a real danger that AT&T will use its control of the interexchange network to undermine competing publishing ventures.

AT&T could discriminate against competing electronic publishers in a variety of ways. It could, for example, use its control over the network to give priority to traffic from its own publishing operations over that of competitors. A second concern is that, inasmuch as AT&T has access to signalling and traffic data, it might gain proprietary information about its competitors' publishing services. Furthermore, it appears that AT&T would have both the incentive and the opportunity to develop technology, facilities, and services that favor its own publishing operations and the areas served by these operations rather than the operations of the publishing industry at large. Similarly, AT&T could discriminate in interconnecting competitors to the network and in providing needed maintenance on competitors' lines. Finally, AT&T might submit tariffs that would have the effect of favoring AT&T's publishing operations to the disadvantage of competing concerns.

AT&T and the Department of Justice provide the same response to these arguments that they make in other contexts: that market forces will curtail AT&T's ability effectively to engage in these practices. In the absence of special problems

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[209] These are the same problems that have been claimed to exist in other markets, but as is apparent from discussion below, they take on a different and more serious complexion in this context.

[210] See Parts V(A) and VI(A) *supra*.

and concerns relating only to the electronic publishing industry, the Court probably would, as it has in other instances, accept that response. However, in the view of the Court a different conclusion is appropriate here, for the peculiar characteristics of the electronic publishing market would both render anticompetitive acts more damaging to AT&T's competitors in that market and insulate such acts from correction by market forces.

The electronic publishing industry is still in its infancy. Although this business may some day be a very significant part of the American communications system, at present, and most likely for the next several years, a small number of relatively small firms will be experimenting with new technology to provide services to an American public that is, for the most part, still almost totally unfamiliar with them. There can be no doubt that, if AT&T entered this market, the combination of its financial, technological, manufacturing, and marketing resources would dwarf any efforts of its competitors.[211] In fact, AT&T's mere presence in the electronic publishing area would be likely to deter other potential competitors from even entering the market.

It is also readily apparent that competitors in the electronic publishing industry — far more so than competitors in any other industry — could easily be crushed were AT&T to engage in the types of anticompetitive behavior described above. Unlike most products and services, information in general and news in particular are by definition especially sensitive to even small impediments or delays. Information is only valuable if it is timely; by and large it is virtually worthless if its dissemination is delayed. This quality is especially important in electronic publishing because up-to-date information and constant availability are the features likely to be sought by subscribers.

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[211] AT&T has already played a major role in developing technical standards for that industry as evidenced by its involvement in writing the "Presentation Level Protocol" which will be used to code electronic publishing signals and which may become the major protocol used by publishers in the United States.

The trial record in the *AT&T* case reveals many instances when AT&T was slow to respond to the needs of competitors, both in providing essential products or parts and in servicing these products and parts.[212] Any delays of that kind, were they to occur in the context of the transmission of electronic publishing information, would quickly cause subscribers to desert their unreliable publishers and thus cripple AT&T's competitors in that business.

Finally, electronic publishers remain more dependent upon the AT&T network than others in the telecommunications business. In some areas, AT&T is the sole provider of intercity services. Elsewhere, where competition does exist, the other common carriers — although capable of handling voice transmissions — frequently lack the sophisticated facilities necessary to meet the needs of the electronic publishers.[213] Systems that are specifically designed to transmit data do not provide a satisfactory solution; most of these systems lease part, if not all, their facilities from AT&T. Nor are satellites the answer, for at least for the present they do not appear to present a realistic alternative, given their restricted availability, potential transmission problems, and high costs.

Thus, should AT&T engage in anticompetitive activity, publishers would have no realistic alternative transmission

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[212] See, *e.g.*, Testimony of Lowell Hoxie (March 10, 1981); Pier Abetti (March 11, 1981); and Luther R. Hinton (March 20, 1981).

[213] For example, the networks of the other common carriers may not be extensive enough to connect a publisher, or a publisher's customers, to the required data bases without relying at least in part on facilities provided by AT&T. Moreover, because competing facilities are not as extensive as AT&T's, the likelihood of congestion on their transmission lines, which causes the calls to receive busy signals, is far greater.

It is of course possible that these publishers could use any alternate transmission systems developed to service the needs of providers of other types of information services. However, it is not clear that those networks will develop in ways which will meet the needs of electronic publishers. Therefore, they cannot be relied upon to serve as a check upon AT&T's power.

system by which to reach their subscribers. The low level of demand for these services that exists at present makes it unlikely that competing interexchange carriers would construct transmission systems to be used solely for the delivery of electronic publishing services, and publishers would therefore be forced to accept the inferior services provided by AT&T.

Based on competitive considerations alone, therefore, the Court might well be justified in barring AT&T from electronic publishing industry. Beyond that, AT&T's entry into the electronic publishing market also poses a substantial danger to First Amendment values.

The goal of the First Amendment is to achieve "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945). See also *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978). This interest in diversity has been recognized time and again by various courts. In *Red Lion Broadcasting* v. *FCC*, 395 U.S. 367, 390 (1969), for example, the Supreme Court observed that

> [i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market.

See also *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). Judge Learned Hand, speaking for the Court of Appeals for the Second Circuit, similarly noted that the media serve "one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as possible."[214] *United*

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[214] The court further explained that this diversity is essential because the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we staked upon it our all." *Id.*

States v. *Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 321 U.S. 1 (1945).[215]

The striving for diversity in sources of information has found expression not merely in the traditional and constitutional prohibition on control of news by government but also in some private contexts, notably in regard to the broadcast media. The Federal Communications Commission is charged by the Communications Act with granting broadcast licenses in the "public interest, convenience and necessity." 47 U.S.C. §§ 301, 303, 307, 309. Pursuant to that public interest standard, the Commission has time and again adopted rules designed to promote diversity among the broadcast media.[216] These rules, and the policies underlying them have repeatedly been sustained by the Supreme Court and the Court of Appeals for this Circuit.

For example, in *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 201-04 (1956), the Supreme Court recognizing the importance of diversity and the authority of the FCC to determine the public interest, upheld rules placing limitations on the total number of broadcast stations a person may own or control. See also, *National Broadcasting Co.* v. *United States*, 319 U.S. 1980 (1943). Likewise, in *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978),

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[215] Both the chairman of the House Subcommittee on Telecommunications, Consumer Protection, and Finance and AT&T agree with this principle. Congressman Timothy E. Wirth has aptly pointed out that "the information market provides much more than economic good, for assuring a diversity of information sources is critical to the proper functioning of the entire democratic system." Hearings on H.R. 5158, *supra*, note 141 at Part 3, p. 1. Similarly, Charles Marshall, an AT&T executive vice president, recently testified before the same subcommittee that "the best way to assure a diversity of these kinds of information services to the American public is to assure a diversity of sources." Hearings on H.R. 5158, *supra*, note 141, at Part 2, p. 137.

[216] FCC policies prohibit formation or transfer of co-located newspaper-broadcast combinations (*FCC* v. *National Citizens Committee*, *supra*, 436 U.S. 775 (1978)); common ownership of more than one broadcast station in the same area (47 C.F.R. § 73.35, 73.240, 73.636); operation of cable systems by a telephone company (47 C.F.R. § 63.54); and ownership of cable systems by a television network (47 C.F.R. § 74.1131).

the Court sustained regulations which banned the award or transfer of a broadcast license where there was a common ownership of a broadcast station and a daily newspaper located in the same locality, stating (436 U.S. at 801-02),

> . . . the Commission has acted 'to enhance the diversity of information heard by the public . . . .' The regulations are a reasonable means of promoting the public interest in diversified mass communications.[217]

Certainly, the Court does not here sit to decide on the allocation of broadcast licenses. Yet, like the FCC, it is called upon to make a judgment with respect to the public interest and, like the FCC, it must make that decision with respect to a regulated industry and a regulated company.

In determining whether the proposed decree is in the public interest, the Court must take into account the decree's effects on other public policies, such as the First Amendment principle of diversity in dissemination of information to the American public. See part II *supra*. Consideration of this policy is especially appropriate because, as the Supreme Court has recognized, in promoting diversity in sources of information, the values underlying the First Amendment coincide with the policy of the antitrust laws. *FCC* v. *National Citizens Committee for Broadcasting*, *supra*, 436 U.S. at 800, n. 18.

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[217] The Court of Appeals, speaking in the same case, was even more explicit.

> . . . Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcast field [citing case] . . . . The First Amendment 'rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. [citing case]. The 'public interest' standard necessarily invites reference to First Amendment principles . . . .' Although no provision of the Communications Act expressly grants the Commission authority to restrict newspaper ownership of broadcast stations, such express authority is not essential to the validity of Commission regulations. 47 U.S.C. § 309(a) requires the Commission to find the 'public interest, convenience and necessity will be served' by the grant of a license.

National Citizens Committee for Broadcasting v. *FCC*, 555 F.2d 938, 948-51 (1977), *aff'd in part*, 436 U.S. 190 (1978).

Applying this diversity principle to the issue here under discussion, it is clear that permitting AT&T to become an electronic publisher will not further the public interest.

During the last thirty years, there has been an unremitting trend toward concentration in the ownership and control of the media. Diversity has disappeared in many areas; newspapers have gone out of business; others have merged; and much of the flow of news and editorial opinion appears more and more to be controlled and shaped by the three television networks and a handful of news magazines and metropolitan newspapers.

This concentration presents obvious dangers even today. Unless care is taken, both the concentration and the attendant dangers will be significantly increased by the new technologies. Indeed, it is not at all inconceivable that electronic publishing, with its speed and convenience will eventually overshadow the more traditional news media, and that a single electronic publisher would acquire substantial control over the provision of news in large parts of the United States. See also part IV(A) *supra*.[218]

The concentration that now exists in the media has presumably been brought about by impersonal economic and technological forces, and it is obviously beyond the concern of this or any other court. But the particular concentration

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[218] De Tocqueville observed with his usual prescience long ago that revolutions by means of the press would most likely come about from its centralization in a few powerful organs. A. de Tocqueville, *Democracy in America* (1835) chapter XI. Richard Reeves who recently retraced de Tocqueville's travels, took note of the development of two-way telecommunications which allowed citizens instantaneously to record their thoughts on the political issues of the day, and he commented that

> [w]hoever decides which questions are to be asked and how they are to be worded has enormous power . . . . The results of these instant referenda would then be flashing in front of each legislator. A member of Congress, knowing public opinion in the district or the country, would then have the dubious honor and politically dangerous duty of voting, perhaps testing his or her conscience against the recorded will of the majority.

R. Reeves, *American Journey* 89–90 (1982).

that may emerge from the proposed decree is subject to the Court's jurisdiction in this antitrust case as part of the instant proceeding. Not only is AT&T a regulated company, and not only does the proceeding stem directly from serious charges of anticompetitive conduct, but the Court has been mandated not to approve the proposed decree unless it finds it to be in the public interest. AT&T's ability, described above, to use its control of the interexchange network to reduce or eliminate competition in the electronic publishing industry is the source of this threat to the First Amendment principle of diversity.

In sum, for a variety of reasons, the entry of AT&T into electronic publishing involves risks to the public interest that are greater than those which would be involved by that company's entry into other markets. Since under the Sherman Act, it is appropriate to bar a company from a market if the restriction is necessaray to permit the development of competition in that market (*Ford Motor Co.* v. *United States*, *supra*, 405 U.S. at 577-78),[219] and since First Amendment values, too, support a ban on electronic publishing by AT&T, the Court will require that the company be prohibited from entering the market.[220]

At the same time, a prohibition on electronic publishing does not impose an undue burden on AT&T.[221] The company is free to enter all the other computer, computer-related, and information services markets; and it will simply be barred from the creation or control of the information to be trans-

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[219] The Court explicitly rejected Ford's argument that the manufacturing prohibition removed a potential competitor from the market, finding that the restriction was necessary to allow the development of competition in the industry. *Id.*

[220] Such a prohibition will not have anticompetitive consequences because AT&T has no special expertise in creating information which would make it a potent competitor in this market. It could overwhelm competitors only because of its ability to engage in anticompetitive conduct.

[221] The Court notes that AT&T has stated that, although it does not wish to be legally bound, "it now has no intention to provide information services that would be competitive with the news and features of newspaper or with broadcasting or traditional cable television services." AT&T Reply Brief, p. 116.

mitted.[222] AT&T may thus fulfill its traditional function of providing a delivery system for information which others wish to transmit, and it may also manufacture and market equipment for the electronic publishing industry and provide transmission services for other electronic publishers.[223]

The restriction on electronic publishing — like any limitation on competition — should only remain in effect for the period necessary to establish conditions conducive to free and fair competition. Since it is not likely that the factors enumerated above which militate against AT&T's immediate entry into the electronic publishing market will continue to exist indefinitely, the Court will place a time limit on its prohibition. See *Ford Motor Co.* v. *United States*, *supra*, 405 U.S. at pp. 562, 575 n. 10, where the Court upheld an antitrust decree that prohibited Ford from entering the spark plug manufacturing business but limited that prohibition to a period of ten years.

Section VII of the proposed decree allows modifications to be made in its provisions upon the application of a party or an Operating Company. It is the intention of the Court to remove the prohibition on electronic publishing at the end of seven years from the entry of the decree should application for such removal be made pursuant to Section VII. That

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[222] AT&T may engage in this activity if the information is delivered over transmission facilities in which AT&T has no interest. In that case, there would be no possibility of anticompetitive activity, because AT&T would have no control over the transmission of its publishing services.

[223] Beyond that, the Bell System has long been engaged in providing a variety of services which, although relatively minor in character, could loosely be regarded as falling into the category of electronic publishing. Because of that involvement without significant adverse consequences, it is not necessary in the public interest that AT&T be precluded, and AT&T will not be precluded, by the modification required below, from offering the following: electronic directory services including listings of general product and business categories, and of the service or product providers under these categories, and their names, telephone numbers, and addresses; such traditional Bell System services as time, weather, and such other audio services as are being offered as of the date of the entry of the decree to the geographic areas of the country receiving those services as of that date; and the dissimination of information to and from AT&T's affiliates.

seven-year period should be sufficient for the development of electronic publishing as a viable industry, for the acquisition of sufficient strength by individual publishers adequate to permit them to compete, and for the development of means other than the AT&T network for the transmission of the messages of electronic publishers. During that same period, the new AT&T will also have acquired a track record with respect to behavior toward its competitors in other areas of the telecommunications business.[224]

VII

Restrictions on the Divested Operating Companies

The proposed decree limits the Operating Companies, upon their divestiture, to the business of supplying local telephone service. In addition to a general prohibition against the provision of "any product or service that is not a natural monopoly service actually regulated by tariff," there are more specific restrictions in Section II(D) which deny the Operating Companies the opportunity to engage in the following activities: (1) the provision of interexchange services; (2) the provision of information services; (3) the manufacture of telecommunications products and customer premises equipment; (4) the marketing of such equipment and (5) directory advertising, including the production of the "Yellow Pages"[225] directories.[226]

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[224] The Court expects to allow any opponents of the removal of the prohibition to comment on the question whether its continuation will be in the public interest, and, should they be able to show that competitive conditions clearly require the maintenance of the ban, it will not be lifted. However, the burden will at that time be on such opponents to demonstrate that the public interest requires the continued exclusion of AT&T from electronic publishing.

[225] These are the directories currently produced by the Operating Companies or under their auspices, for each geographic region which they serve. These directories contain subscriber listings grouped by subject matter along with advertisements.

[226] No specific provision of the proposed decree deals with directory advertising, but the parties have stated that the general prohibition against provision of non-monopoly services includes production of the Yellow Pages. See Competitive Impact Statement at 29 n. 24.

Restrictions of this type may validly be imposed if they are necessary to prevent the occurrence or recurrence of anticompetitive conduct. *Ford Motor Co.* v. *United States*, *supra*, 405 U.S. at 577-78. See Part II *supra*. However, as the Department of Justice[227] concedes, such restrictions deserve "the most careful scrutiny" to ensure both that they will have the desired effect and that they will not actually limit competition by unnecessarily barring a competitor from a market. Department of Justice Response to Comments at 56.

These restrictions are justified, according to the Department, because the Operating Companies will have "both the ability and the incentive" to thwart competition in these markets by leveraging their monopoly power in the intraexchange telecommunications market.[228] In the absence of the restrictions, it is reasoned, the Operating Companies will be able (1) to subsidize their prices in competitive markets with supracompetitive profits earned in the monopoly market, and (2) to hinder competitors by restricting their access to the intraexchange network. In short, it is the Department's view that the divested Operating Companies may appropriately be equated with the present Bell System complex in that, if permitted to enter competitive markets, they may be expected to engage in the same type of anticompetitive behavior that was the crux of the *AT&T* lawsuit.

The government's approach, while not without conceptual neatness, fails to take account of circumstances far more complex than these undifferentiated rules acknowledge. The Bell System is a vast, vertically integrated company which dominates local telecommunications, intercity telecommunications, telecommunications research, and the production and marketing of equipment. Each of the divested Operating Companies will have a monopoly in only one geographic

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[227] It appears that the Department is the principal proponent of the restrictions on the Operating Companies. AT&T has generally taken the stance that it agreed to these restrictions as part of the overall settlement.

[228] Response to Comments at 54. See also *id.* at 53-61; Competitive Impact Statement at 27.

portion of one of these markets — local telecommunications. In addition, the Bell System as presently constituted has few powerful competitors in any of the activities in which it is engaged. The Operating Companies, by contrast, will, if permitted to enter competitive markets, be faced with the most potent conceivable competitor: AT&T itself. Thus, the only similarity between the divested Operating Companies and the present Bell System is that both possess a monopoly in local telecommunications.

That single circumstance — important though it may be — is not a sufficient basis upon which to restrict competition generally in the name of the antitrust laws. If this were the case, all monopolies might have to be barred from competitive industries, and even the Department of Justice acknowledges that this drastic remedy is not required. See Response to Comments at 55. The Tunney Act's public interest standard permits the Operating Companies to be barred from a competitive market only if there is a substantial possibility that they will use monopoly power to impede competition in that market. Two basic factors are relevant to this determination.

The restrictions are based upon the assumption that the Operating Companies, were they allowed to enter the forbidden markets, would use their monopoly power in an anticompetitive manner. It is accordingly necessary for the Court first to determine whether these companies will actually have the incentive and opportunity to act anticompetitively.[229] Second, the restrictions are, at least in one sense, directly anticompetitive because they prevent a potential competitor from entering the market. The Court must accordingly also consider the extent to which the participation of the Operating Companies would contribute to the creation of a competitive market.[230]

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[229] The Court cannot accept the proposition advanced by some that state and federal regulation alone will eliminate the possibility of anticompetitive abuses by the Operataing Companies. If regulation could effectively prevent these practices, there would have been no need for the *AT&T* action. See part IV *supra*.

[230] There is no basis for the government's contention that the participation of the Operating Companies in these markets would be of little competitive

In addition, the Court must assess the effect of the restrictions upon other important public policies. Many persons,[231] including particularly the States, claim that these restrictions would have adverse consequences in that they would either undermine the financial viability of the divested Operating Companies, or produce substantial increases in the rates for local telephone service, thus eroding the statutory goal of universal telephone service for all Americans. See 47 U.S.C. § 151.[232] This factor, to be sure, cannot preclude the imposition of a restriction necessary to preclude the anticompetitive activity; but to the extent that a restriction does not have a procompetitive effect, it may not be imposed if it infringes upon other public policies. See generally Part II *supra*.

The Court will examine the various substantive provisions in light of these general principles.[233]

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value. Their expertise in telecommunications and their large customer base would make them natural competitors in these fields.

[231] Including the members of the House Subcommittee on Telecommunications, Consumer Protection, and Finance who submitted their views to the Court. See note 63 *supra*.

[232] Evidence introduced during the *AT&T* trial indicated a definite correlation between increases in local telephone rates and the number of homes with a telephone. See Testimony of Louis J. Perl (November 23, 1981); Exhibit D-4-1518.

[233] Some have contended that the Court should not assess the propriety of the restrictions without holding evidentiary hearings with regard to the need therefor, their effect upon local rates, and related matters. The legislative history of the Tunney Act indicates that the court reviewing a proposed consent decree has broad discretion in fashioning the procedures for the public interest review. Both congressional committees stated, "Only where it is imperative that the court should resort to calling witnesses for the purpose of eliciting additional facts should it do so." S. Rep. No. 93-298, *supra*, at 6-7; H.R. Rep. No. 93-1463, *supra*, at 8. The record in the *AT&T* action contains extensive information about the competitive structure of the entire telecommunications industry. This Court has relied upon that record in assessing the competitive significance of the proposed restrictions, and an evidentiary hearing concerning such matters is therefore not necessary.

Similarly, there is no need for a hearing concerning the effect of the restrictions upon local rates. Any testimony on that issue could only be speculative and would be unlikely to assist the Court in its public interest

A. Interexchange Services

The proposed decree prohibits the divested Operating Companies from providing interexchange services. This restriction is clearly necessary to preserve free competition in the interexchange market.

Access to the local exchange is essential for all interexchange carriers and, as the evidence in the *AT&T* action has suggested, there are many ways in which the company controlling the local exchange monopoly could discriminate against competitors in the interexchange market. See Part IV *supra*. After divestiture, the Operating Companies' incentives to engage in such activity will remain unchanged: they would stand to gain business if other carriers were disadvantaged by poor access arrangements and high tariffs.

To permit the Operating Companies to compete in this market would be to undermine the very purpose of the proposed decree — to create a truly competitive environment in the telecommunications industry. The key to interexchange competition is the full implementation of the decree's equal exchange access provisions. See Part VIII *infra*. If the Operating Companies were free to provide interexchange service in competition with the other carriers, they would have substantial incentives to subvert these equal access requirements. The complexity of the telcommunications network would make it possible for them to establish and maintain an access plan that would provide to their own interexchange service more favorable treatment than that granted to the other carriers. Such a result would perpetuate the very inequalities that the proposed decree is designed to eliminate. Finally, the Operating Companies would also retain the ability to subsidize their interexchange prices with profits earned from their monopoly services.

Those who object to this restriction suggest (1) that the Operating Companies would provide additional competition in the interexchange market and (2) that revenues from

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determination. In addition, the effect of the restrictions upon local rates does not represent the crux of the Court's decision on these quesitons.

interexchange operations would increase that viability and reduce the need for local rate increases. These objections have little merit in this context. If the Operating Companies entered the interexchange market and competed fairly, without exploiting their local monopoly positions, the resulting increase in competition would not be substantial.[234] Moreover, the Operating Companies could realistically recoup substantial profits from their interexchange operations only by using their monopoly power to disadvantage competitors.[235] But that, of course, would be precisely the behavior which brought about the 1974 lawsuit against AT&T and the current proposal for a decree. In short, there are clear, and indeed overwhelming, procompetitive justifications for this restriction.[236]

B. Information Services

The proposed decree prohibits the Operating Companies from providing information services, an umbrella description of a variety of services including electronic publishing and other enhanced uses of telecommunications.[237] This prohibition is necessary for reasons similar to those justifying the restriction on interexchange services, as well as for additional reasons not relevant to the interexchange problem.

All information services are provided directly via the telecommunications network. The Operating Companies would therefore have the same incentives and the same ability to

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[234] The Operating Companies would simply be additional competitors in a market that is already quite competitive. See Part V *supra*.

[235] Competition in the interexchange market would tend to drive prices close to costs. Thus, absent anticompetitive activity, it is unlikely that the Operating Companies would be able to earn a profit large enough to provide any meaningful subsidy to local rates.

[236] The proposed decree's clauses permitting AT&T to provide some intraexchange services in competition with the Operating Companies are not inconsistent with this result. AT&T will not have the power to disadvantage the Operating Companies because the local companies do not require access to AT&T's network to provide exchange telecommunications. It is AT&T that will be dependent upon the Operating Companies for access to its customers, not vice versa.

[237] For a full discussion of the meaning of this term see Part VI *supra*.

discriminate against competing information service providers that they have with respect to competing interexchange carriers. Here, too, the Operating Companies could discriminate by providing more favorable access to the local network for their own information services than to the information services provided by competitors, and here, too, they would be able to subsidize the prices of their services with revenues from the local exchange monopoly.[238]

There is also the effect on the configuration of the local networks to consider. Many of the competitive problems in the interexchange market resulted from the fact that competition was introduced after AT&T had designed the local networks to service only its own Long Lines department. If the Operating Companies are excluded from the information services market, they will have an incentive, as time goes on, to design their local networks to accommodate the maximum number of information service providers, since the greater the number of carriers the greater will be the Operating Companies' earnings from access fees. Thus, competition will be encouraged from the outset. If, however, the Operating Companies were permitted to provide their own information services, their incentive would be the precise opposite: it would be to design their local networks to discourage competitors, and thus to thwart the development of a healthy, competitive market.[239]

The restriction on the provision of information services by the Operating Companies has been attacked on the ground

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[238] For similar reasons, the Court rejects the argument that the Operating Companies can most efficiently provide information services by taking advantage of various economies (such as using the same equipment for exchange telecommunications and for information services). It would be impossible to determine at any time whether the Operating Companies' advantages were due to inherent efficiencies, or to efficiencies created by structuring the network so as to hinder competition. The experience with AT&T's activities with regard to interexchange competition indicates that the latter is a possibility which would be difficult to detect or prevent.

[239] The reasons underlying the ban on provision of electronic publishing services by AT&T provide further support for restricting the Operating Companies from this activity. See Part VI *supra*.

that it will remove their incentive to upgrade the local networks and will cause them to become technological backwaters.[240] This claim underrates the role of the Operating Companies under the proposed decree. These companies will carry traffic between the information service providers and their subscribers; their networks will therefore have to be capable of carrying these technologically advanced services; and they will have a financial incentive to create this capability because they will earn access charges for providing this service.[241]

For all of these reasons, the imposition of this restriction is fully consistent with the antitrust laws.

C. Manufacture of Equipment

The provision in the proposed decree which prohibits the Operating Companies from manufacturing telecommunications equipment and customer premises equipment (CPE)[242] is also an outgrowth of the government's case in the *AT&T* action. The basic rationale of the procurement portion of that case was that

> a combination of vertical integration and rate-of-return regulation . . . tended to generate decisions by the Operating Companies to purchase equipment produced by Western [Electric] that is more expensive or of less quality than that manufactured by the general trade.

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[240] It cannot be claimed that this restriction will result in rate increases: the Operating Companies do not now provide such services on any large scale, and it is not at all clear that they would be a great source of profit to them in the future.

[241] Entry of the Operating Companies into this market is not necessary to provide competition for AT&T. The large amount of interest generated by this growing industry indicates that there will be a number of competitors. See part V(A) *supra*.

[242] Telecommunications equipment is used by a carrier to provide telecommunications services. Proposed Decree, Section IV(N). Customer premises equipment is used on subscriber's premises to originate, route, or terminate telecommunications (*e.g.*, telephone sets, answering machines). Section IV(E).

United States v. *AT&T*, *supra*, 524 F. Supp. at 1373. The government presented evidence to support this theory, which tended to show that AT&T headquarters and the service components of the Bell System — the Bell Operating Companies and the Long Lines Department — engaged in systematic efforts to disadvantage outside suppliers. *Id.* at 1371-74. See also Part IV *supra*. That theory and that evidence directly support the proposed prohibition on the manufacture of equipment by the Operating Companies.

There is a substantial likelihood that, should the Operating Companies be permitted to manufacture telecommunications equipment, nonaffiliated manufacturers would be disadvantaged in the sale of such equipment and the development of a competitive market would be frustrated. The Operating Companies would have an incentive to subsidize the prices of their equipment with the revenues from their monopoly services as well as to purchase their own equipment, even though it was more expensive and not of the highest quality. In that respect, the Operating Companies lack the competitive restraints that ordinarily prevent the typical vertically-integrated company from engaging in such practices: the absence of competition in the end product market — exchange telecommunications — immunizes these purchasing decisions from competitive pressures. The Operating Companies therefore would be able to pay inflated prices for poor quality equipment and to reflect these costs in their rates without suffering a diminution in revenues. See *United States* v. *AT&T*, *supra*, 524 F. Supp. at 1373.[243]

Moreover, if they were permitted to manufacture CPE, the Operating Companies would have substantial incentives

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[243] This rationale does not require the divestiture of Western Electric from the Bell System because AT&T's end products — interexchange services and information services — will be subject to competitive pressures. If AT&T paid a higher price for its equipment and that cost was reflected in higher rates, consumers would switch to a carrier with prices which reflected purchasing decisions based upon the principles of best quality and least cost.

to favor their own manufacturing arms by providing to them information regarding changes in network standards, thus permitting them to gain an advantage over non-affiliated manufacturers.[244] In addition, they could subsidize the price of this equipment with revenues from the exchange monopoly.

The risks of anticompetitive behavior are not quite as severe as those which exist in connection with the provision of interexchange and information services. However, they are sufficient to support the imposition of the restriction, especially because the entry of the Operating Companies into this market would not provide any substantial impetus to competition to make any significant contribution to the reduction of local rates. The CPE manufacturing industry already contains numerous competitors, including large domestic and foreign firms, and it is wholly unlikely that the Operating Companies could earn supracompetitive profits in this market that would enable them to subsidize local telephone service. The minimal additional competition which they could provide does not outweigh the substantial possibility that they will engage in anticompetitive conduct.

D. Marketing of Customer Premises Equipment

The proposed decree would also prohibit the Operating Companies from selling or leasing customer premises equipment.[245] While the Department of Justice's comments and

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[244] The Department of Justice acknowledges that the registration program established by the FCC, see 47 C.F.R. §§ 68.1 *et seq.* (1981), would somewhat limit the Operating Companies' opportunities to obstruct the attachment to their networks of equipment manufactured by others. Response to Comments at 67-68. However, it seems possible that, where the Operating Company is the manufacturer of a type of equipment, it would still be able to impose interconnection requirements designed to favor that equipment. In addition, the Operating Companies retain the ability to discriminate against equipment manufactured by others with respect to types of interconnections, testing, maintenance and similar matters.

[245] The proposed decree further prohibits the selling or leasing of telecommunications equipment. However, few objections have been raised against this prohibition. There would appear to be little incentive for the

briefs tend to blur the distinction between manufacturing and marketing, in fact the restrictions on the two activities present wholly different considerations. Based upon a realistic assessment, marketing of CPE presents little potential for anticompetitive behavior by the Operating Companies. While the Operating Companies would have the theoretical ability to engage in the types of anticompetitive activities which support the prohibition on manufacturing of CPE, their incentives and their practical ability to do so would be minimal.

Anticompetitive activities undertaken by two separate corporations rather than by two components of the same corporation are likely to be far more difficult to accomplish because of increased problems of coordination and the greater possibility of detection. For example, it would be quite difficult for an Operating Company to conspire successfully with a manufacturer to provide advance information about revised network standards or to impose interconnection restrictions which favored that manufacturer's products and no one else's.[246]

The possibility of successful subsidization of CPE prices with local exchange revenues appears remote for several reasons. First, since the two businesses are so completely different, the Operating Companies would have little ability to engage in cross subsidization by the sharing of common costs. Second, the participation of a second company would

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Operating Companies to act as retailer for this equipment, since the only purchasers would be telecommunications carriers. In the absence of any reasons for removing the restriction, the need to guard against coordination between manufacturers and the Operating Companies is sufficient justification for this prohibition.

[246] Such interconnection restrictions would be unlikely in any event. See note 244 *supra*. It would be even more difficult, if not impossible, to draft an interconnection standard that favored a piece of equipment sold by an Operating Company but did not likewise favor the same equipment when sold by a competing retailer. Even if an Operating Company were the exclusive retailer of certain equipment, it probably could not realistically so tailor the standards as to favor the manufacturer of that particular equipment and, should it attempt to do so, the anticompetitive nature of the standard would be apparent on its face.

probably make cross subsidization far easier to detect.[247] Third, the second company's participation in most of the schemes would most likely reduce the profits which the Operating Companies could reap. When these increased risks of detection are combined with the decreased financial gain, it is clear that the incentives for participation of the Operating Companies in cross subsidization schemes are substantially reduced.

As against these relatively slight risks to competition from Operating Company involvement in the marketing of CPE must be weighed the very substantial contribution these companies could make to vigorous competition in the customer premises equipment market. Under the proposed decree, AT&T will retain both the embedded customer premises equipment and the existing network of retail outlets.[248] These factors, combined with Western Electric's large market share,

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[247] The rules governing CPE pricing imposed by the FCC's *Computer II* decision will also make it more difficult to engage in cross subsidization.

[248] There is no reason to change the allocation of these assets provided for in the proposed decree. The embedded CPE consists primarily of Western Electric equipment, and it is therefore appropriately allocated to AT&T. As for the retail stores, there is no basis for concluding that the retention of these assets by AT&T will be anticompetitive. The Operating Companies will have substantial retail access through their contact with the individual telephone subscribers, and they should be able to build their own retail outlets on this basis alone to compete with those of AT&T and others.

Some parties have suggested that the embedded CPE should not be transferred to AT&T, claiming that such a transfer would have a substantial impact upon the Operating Companies' revenues from interexchange activities. This argument apparently proceeds on the theory that the transfer will reduce the Operating Companies' rate bases and therefore also reduce the amount they are entitled to receive under the so-called separations and settlements process for the use of their equipment by interstate traffic. However, the proposed decree eliminates the division of revenues process and mandates its replacement by a system of access charges. Regulatory authorities may set the access charges so as to guarantee the Operating Companies the same amount that they received under the separations process irrespective of the rate base. In addition, the FCC's decision in *Computer II* will, if ultimately upheld on appeal, result in the eventual deregulation of all CPE and its removal from Operating Companies' rate bases in any event.

will at a minimum, ensure its continuation as a formidable provider of CPE for a considerable period of time. The Operating Companies, with their existing relationship to telephone users, are more likely than any other competitive entity to provide an effective counterbalance to AT&T's market strength and thereby to promote a genuinely competitive market.[249]

The Court concludes that, for the reasons stated,[250] the prohibition on marketing by the Operating Companies of customer premises equipment is not in the public interest, and it will therefore require that the proposed decree be modified to eliminate this prohbition.[251]

E. Directory Advertising

Each Bell Operating Company presently publishes Yellow Pages directories for its service area.[252] The proposed decree

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[249] The Operating Companies may be expected to serve as outlets for many of the small equipment manufacturers, providing a stimulus both for price competition and for innovative design and manufacturing. The competitive nature of this market makes it unlikely that the restriction will have an effect upon local rates.

[250] Additionally, as is also true with respect to the probhibition on the production of the Yellow Pages directories (see Subpart E *infra*), the avoidance of an unnecessary intrusion into matters of direct interest to the states and state regulators, supports removal of the prohibition.

[251] A number of persons have urged that, in the event that it is determined that particular restrictions are not in the public interest, the Operating Companies be required to conduct competitive activities through a separate subsidiary. A separate subsidairy does not eliminate economic incentives for anticompetitive conduct; it is simply a method of revealing intracompany transactions so that regulators may more effectively prevent cross subsidization and other improper behavior. See *NARUC* v. *FCC*, 525 F.2d 630, 637 (D.C. Cir. 1976); *Second Computer Inquiry*, *supra* note 17, 77 F.C.C. 2d 384, 462 (1980). In any event, since separate subsidiaries are essentially a regulatory device, it does not seem appropriate, except in the most unusual circumstances, for an antitrust court to impose such a requirement. If the legislators or the regulators should conclude, for their own reasons, that a separate subsidairy would be appropriate, they may, of course, impose this requirement in the exercise of their own responsibilities.

[252] In some cases the directory is published by an independent organization under contract with the Operating Company.

would bar the divested Operating Companies from all activities related to directory advertising, including the production of the so-called Yellow Pages.[253] This restriction lacks an appropriate basis and is not in the public interest.

Neither of the reasons underlying the other restrictions on the Operating Companies — the need to prevent cross subsidization and the importance of preventing competitor discrimination — has any relevance to the printed directory market.[254]

All parties concede that the Yellow Pages currently earn supra-competitive profits. See, *e.g.*, the Department of Justice Response to Comments at 71. There is no warrant therefore for proceeding on the premise that the advertising prices charged by the Operating Companies are artificially low as the result of a subsidy from local exchange service. Similarly, there is no possibility of improper discrimination by the Operating Companies against competing directory manufacturers since access to the local exchange network is not required for production of a printed directory.[255] In short, the Operating Companies would have little or no ability to discriminate against competitors in the printed directory market, and this restriction thus has no procompetitive justification whatever.[256]

To the contrary, the prohibition on directory production by the Operating Companies is distinctly anticompetitive in

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[253] The Operating Companies are appropriately prohibited from producing electronic versions of the Yellow Pages, for the reasons stated in Subpart B *supra*.

[254] The Department of Justice conceded that "we're not so much worried about competition in print." Hearing on June 29, 1982, Tr. 25184.

[255] These competitors only require access to the Operating Companies' subscriber listings, and there is no claim that the Operating Companies have withheld the lists to stifle competition. In fact, under the proposed decree, they would retain control of the listings. Department of Justice Response to Comments at 71.

[256] It does not even seem to be true that, as the Department of Justice assumes, the Yellow Pages fall as a purely formalistic matter on the competitive side of the monopoly-competition dichotomy. See, *e.g.*, Telecommunications Act of 1982 Hearings, *supra* note 141, at Part 1, pp. 551–52.

its effects, for at least two reasons. In the first place, the production of the Yellow Pages will be transferred from a number of smaller entities to one nationwide company — AT&T.[257] This type of concentration is itself anathema to the antitrust laws. Furthermore, possession of the franchise for the printed directories will give AT&T a substantial advantage over its competitors in providing electronic directory advertising[258] — a market in which the Operating Companies will not be engaged.

In addition to these factors directly related to competition, there are other reasons why the prohibition on publication of the Yellow Pages by the Operating Companies is not in the public interest. All those who have commented on or have studied the issue agree that the Yellow Pages provide a significant subsidy to local telephone rates. This subsidy would most likely continue if the Operating Companies were permitted to continue to publish the Yellow Pages.

The loss of this large subsidy would have important consequences for the rates for local telephone service. For example, the State of California claims that a two dollar increase in the rates for monthly telephone service would be

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[257] Although in theory the Yellow Pages would not be directly transferred to AT&T but would merely be made available to the highest bidder, it is clear that AT&T would in reality become the sole publisher of the Yellow Pages in the United States. Under the proposed decree AT&T will retain all of the personnel who have the experience in producing and marketing the Yellow Pages. Moreover, ingrained customer preferences being what they are, it would appear that, if the Operating Companies are not permitted to publish these directories, the only other widely-known telephone company (AT&T itself) will become the natural heir of this enterprise. This is so particularly since that company, with its financial resources, will inevitably be able to outbid anyone else who seriously considered entering this traditional Bell business. The parties do not dispute the conclusion that the business opportunities represented by the Yellow Pages would be transferred to AT&T. AT&T would hardly undertake to guarantee the Operating Companies' net revenue from the Yellow Pages if it did not expect to obtain the contract. See Defendants' Reply Brief at 35.

[258] The large amount of information received by AT&T, combined with the economies of scale, would give it a natural and in all likelihood insuperable edge in the electronic Yellow Pages market.

necessary to offset the loss of revenues from directory advertising.[259] Other states assert that increases of a similar magnitude would be required.[260] Evidence submitted during the *AT&T* trial indicates that large rate increases of this type will reduce the number of households with telephones and increase the disparity, in terms of the availability of telephone service, between low income and well-off citizens.[261] This result is clearly contrary to the goal of providing affordable telephone service for all Americans.[262]

In addition, as noted in Part III(C) *supra*, the Court must take care to intrude upon state regulation only to the extent necessary to vindicate the federal interest embodied in the antitrust laws. Where, as here, that interest is not furthered, intrusion constitutes an impermissible imposition upon the States.

For these various interrelated reasons, the Court accordingly concludes that the prohibition, express or implied, on publication by the Operating Companies of the Yellow Pages directories is not in the public interest. It will therefore require that the proposed judgment be modified to specify that there will be no such prohibition.[263]

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[259] Topic 2 Brief of People of California, *et al.* at 8-9.

[260] Topic 2 Brief of State of Oregon at Appendix A; Topic 2 Brief of State of Florida at 8; Topic 2 Brief of Virginia State Corporation Commission at 12; Topic 2 Brief of Kentucky, *et al.* at Attachment B, p. 2.

[261] See Testimony of Louis C. Perl (November 23, 1981); Exhibit D-4-1518.

[262] Neither AT&T nor the Department of Justice has provided any assurance that this loss of revenue will not occur. AT&T's promise to guarantee the revenues from Yellow Pages for four years is only a short-range solution. The Department of Justice has retreated from its earlier claims that the Operating Companies will receive equivalent revenues under its scheme for the production of Yellow Pages, and it is now apparently unable to predict the level of receipts. Response to Comments at 71–72.

[263] The assets used in the production of these printed directories will accordingly have to be allocated to the Operating Companies. See Part IX *infra*.

F. Removal of the Restrictions

It is probable that, over time, the Operating Companies will lose the ability to leverage their monopoly power into the competitive markets from which they must now be barred. This change could occur as a result of technological developments which eliminate the Operating Companies' local exchange monopoly or from changes in the structures of the competitive markets. In either event, the need for the restrictions upheld in Subparts A through C will disappear, and the decree should therefore contain a mechanism by which they may be removed.[264]

Recognizing this fact, the Department of Justice has undertaken to report to the Court every three years concerning the continuing need for the restrictions imposed by the decree. Response to Comments at 62. In addition, both parties have agreed that the restrictions may be removed over the opposition of a party to the decree when the Court finds that "the rationale for [the restriction] is outmoded by technical developments." Department of Justice Brief at 32–33; AT&T Brief at 18.

The standard for removal of restrictions proposed by the parties incorporates the Department of Justice's view that the restrictions are justified by the mere existence of monopoly power. However, in the opinion of the Court, the removal of the restrictions should be governed by the same standard which the Court has applied in determining whether they are required in the first instance. Thus, a restriction will be removed upon a showing that there is no substantial possibility that an Operating Company could use its monopoly power to impede competition in the relevant market.[265] See pp. 102–103 *supra*. To avoid any question about the appropriate

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[264] If the restrictions were to continue in effect, their sole effect would be to limit competition by preventing the entry of a viable competitor.

[265] This standard necessarily differs from the one governing the termination of the restrictions against AT&T's participation in the electronic publishing industry because different considerations are involved. See Part VI *supra*.

test,[266] the standard for removal of the restrictions should be explicitly incorporated into the decree.[267]

VIII

Equal Exchange Access

One of the government's principal contentions in the *AT&T* case was that the Operating Companies provided interconnections to AT&T's intercity competitors which were inferior in many respects to those granted to AT&T's own Long Lines Department. There was ample evidence to sustain these contentions. See Part IV *supra*.

Although after divestiture the Operating Companies will no longer have the same incentive to favor AT&T, a substantial AT&T bias has been designed into the integrated telecommunications network, and the network, of course, remains in that condition. It is imperative that any disparities in interconnection be eliminated so that all interexchange and

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[266] The test usually applied to a contested modification of a consent decree was set forth in *United States* v. *Swift & Co.*, 286 U.S. 106, 118 (1932). In that case, the Supreme Court held that the applicable standard was whether there were "unforseen conditions" that indicated the modification was appropriate. Some parties contend that a different standard may not be applied to the removal of the restrictions. However, there appears to be no reason why the decree itself cannot contain provisions governing the expiration of some of its restrictions.

[267] Some interested persons, including the FCC, contend that the restriction limiting the divested Operating Companies to regulated natural monopoly activities is overbroad because these companies should only be barred from activities in which they may be able improperly to utilize their monopoly power in exchange telecommunications, and that these companies should be free to operate unrelated businesses (*e.g.*, restaurants or department stores). A modification along these lines is not appropriate, if only because it would be extremely difficult to draw a comprehensive definition of the areas in which the Operating Companies' activities must be limited. Moreover, such a definition is unnecessary if the parties include in the proposed decree the Court's standard for the removal of restrictions on the activities of the divested Operating Companies. A divested Operating Company which sought to engage in an unrelated industry could then petition the Court for removal of the restriction as it pertains to that industry, and if there was no realistic possibility of abuse of monopoly power, the Court could simply grant the petition.

information service providers will be able to compete on an equal basis.

The Court has examined the equal access provisions of the decree and it is satisfied that, with limited exceptions, they meet the public interest standard.

A. General Principles

The governing principle established by the proposed decree is that by September 1, 1986, the Operating Companies must provide access services[268] to interexchange carriers and information service providers which are "equal in type, quality, and price" to the access services provided to AT&T and its affiliates. Section II(A). This broad guarantee of equal treatment, when implemented, will effectively remove any interconnection-type obstacles to free competition between AT&T and the other carriers;[269] it therefore comports with the public

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[268] These are the services which permit the origination or termination of an interexchange telephone call and similar transmission assistance for information services.

[269] Several radio common carriers and owners of private communications systems contend that the equal access requirement should also apply to their interconnections with the Operating Companies instead of only to interconnection by the interexchange carriers and information services providers. The Court finds justified the parties' decision not to address these specialized demands.

The access services required by these carriers are likely to differ from those needed by interexchange carriers and to differ also from carrier to carrier. For example, unlike interexchange carriers, owners of private systems are generally satisfied with their present interconnection arrangements (see Comments of Association of American Railroads at 8) but radio carriers wish their services to receive interconnection as would a Bell System Class 5 Switch (see Comments of Telocator Network of America at Appendix E). The decree could not establish all the various standards for interconnection for the large number of systems which seek access to the local networks of the divested Operating Companies. Nor is this necessary, for there is no support for the underlying premise of these carriers' contentions that the divested Operating Companies will have an incentive to alter the existing connecting arrangements for private systems. The question of proper interconnection of radio carriers has been addressed by the FCC and is currently before the Court of Appeals for this Circuit. *Cellular Communications Systems*, 86 F.C.C. 2d 469 (1981), *on reconsid-*

interest and will be endorsed and enforced by the Court.[270]

As indicated, the equal access requirement does not become effective immediately. There is a phase-in period: the Operating Companies must begin offering equal access by 1984; carriers must be able to obtain equal access for one-third of their subscribers by 1985; and such access must be furnished to all subscribers "upon bona fide request" by 1986. The decree also fails to specify the manner in which equal access will be provided; rather, it permits each Operating Company to devise an appropriate plan to fulfill this requirement.[271]

The Court finds these provisions to be reasonable and not inconsistent with public interest. Major changes in switching equipment — such as those that will be necessary to provide equal access to all interexchange and information providers — realistically take months or in some instances years to accomplish.[272] For that reason, the Court could not expect

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eration, 89 F.C.C. 2d 58 (1982), *appeal pending sub nom. Millicom, Inc. v. FCC*, No. 81-1404 (D.C. Cir.). For these reasons, the Court will not require the parties to modify the proposed decree specifically to address these concerns.

[270] As is true with respect to all of the principles and promises underlying the decree, they acquire meaning only through implementation. The Department of Justice may be expected, in the first instance, to see to it that there is appropriate implementation but, as described in Part XI *infra*, the Court also intends to see to it that all these principles and premises are actually carried out.

[271] The divested Operating Companies must file tariffs for their access services. Revenues collected pursuant to these tariffs will substitute for funds currently received by the Operating Companies under the division of revenue process, which allocates interstate toll revenues between the operating companies and the Long Lines Division. See Proposed Decree at Appendix B(B). Tariffs for intrastate interexchange access services will be filed with the state regulatory commissions, tariffs for interstate interexchange access services with the FCC. The proposed decree requires the Operating Companies to file tariffs which are cost-justified, but it does not limit the authority of the regulators to allocate costs pursuant to their regulatory policies. Thus, these tariffs may be set at a level which continues the current allocation of interexchange revenues. See also note 161 *supra*.

[272] Testimony of Irwin Dorros (November 24, 1981). For similar reasons, the provision permitting the Operating Companies to seek Court permission not to provide equal access services where, as a result of technologically

equal access to be achieved immediately or to be phased-in on a more expedited basis than is contemplated in the proposed decree.[273] Similarly, since the Bell System network is both vast and complex, a variety of approaches will in all probability be necessary to achieve equal access. Imposition by the Court of a single procedure applicable to all areas and all interconnection requirements is likely to create inefficiencies and impose added costs on the Operating Companies without achieving superior results.

The Court therefore finds that, generally speaking,[274] the means provided in the proposed decree to achieve equal access are adequate to protect the public interest.

B. Exceptions to Equality

The proposed decree contains some exceptions to the broad mandate of equality. These exceptions must be closely scrutinized to determine whether they will give AT&T an unjustified advantage over other carriers and thus obstruct the development of free competition.[275]

First. Long distance calls may presently be placed over the AT&T network by dialing ten or eleven digits while twenty-two or twenty-three digits are necessary to use the

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outdated switches "such access is not physically feasible except at costs that clearly outweigh potential benefits to users of telecommunications services," is also a justifiable deviation from absolute equality. Proposed Decree, Appendix B(A)(3).

[273] The decree does not, however, preclude the Operating Companies from providing equal access more expeditiously if they are capable of doing so.

[274] See Part B *infra*.

[275] Both AT&T and the Department of Justice cite this Court's ruling during an earlier phase of the *AT&T* proceedings with regard to interconnection to AT&T's network that "absolute equality of access to essential facilities . . . is not mandated by the antitrust laws." *United States* v. *AT&T*, *supra*, 524 F. Supp. at 1360. The Court's statement has reference to the access necessary to avoid antitrust liability. It is not necessarily the appropriate standard for evaluating an antitrust remedy. A remedy must impose the requirements reasonably necessary to open the relevant markets to competition. See Part II *supra*.

facilities of the other interexchange carriers. This substantial disparity in dialing convenience has had a significant negative impact on competition.[276] Under the proposed decree, this disparity will be drastically reduced, but some difference in the number of digits will remain: fourteen digits will be needed for the use of the facilities of a competing carrier while ten or eleven will be required for calls placed over the AT&T network.[277]

The reason given by the parties for this continued distinction is that full dialing parity is impossible without a change in the national area numbering plan. It appears, furthermore, that a change in that plan for all the telephone instruments in the United States would be both difficult and costly. When the FCC orders a revision in that plan — which it apparently has the authority to do at any time — the dialing parity which is in keeping with the equality principles of the proposed decree will in fact be achieved.

It is inappropriate for the Court to order such a change in advance of the FCC-required change-over; the difference in the required number of digits simply does not present an obstacle to competition sufficient to require the expense and effort involved in an early change in the plan.[278] This conclusion

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[276] Testimony of Bert C. Roberts, Jr. (April 27, 1981); Testimony of Jeffrey J. Kushan (May 1, 1981); Testimony of George Vasilakos (June 16, 1981).

[277] Proposed decree at Appendix B(A)(2). While the proposed decree states only that the "minimum number of digits" will be used, AT&T has indicated that fourteen digits will be required. See AT&T Reply Brief at 40.

[278] Somewhat similar considerations apply to the facilities-sharing question. After divestiture, AT&T will necessarily share facilities with the Operating Companies because the physical components of the nationwide network cannot be neatly divided between them. It would be inappropriate to require in the interest of symmetry, that the Operating Companies also to share facilities with the other interexchange carriers. This requirement would severely limit the Operating Companies' freedom to design their own networks and, as the number of carriers increases, such sharing could become physically impossible.

The decree appropriately ameliorates AT&T's advantages resulting from sharing by requiring the Operating Companies' charges to other carriers

is buttressed by the requirement in the proposed decree that the divested Operating Companies provide a service which will permit a subscriber to route his calls automatically to a single interexchange carrier other than AT&T. Appendix B(A)(2)(ii).[279] By means of this service, the subscriber will be able to use that carrier's network by dialing only the same ten or eleven digits that are required of an AT&T subscriber.

Second. Another exception to full equality is a provision which will permit the Operating Companies to provide billing services for only one interexchange carrier[280] which presumably will be AT&T.[281] Unquestionably, it would impose a considerable expense and administrative burden upon the Operating Companies to require them to provide billing services for all intercity carriers, and in the view of the Court this would not be in the public interest. Another alternative for the achievement of complete equality would be to prohibit the Operating Companies from providing billing services to any carrier (including AT&T). If this were done, AT&T would, of course, have to do its own billing.

The parties claim, and the Court agrees, that if AT&T had to establish its own billing system, it could do so only on the basis of a surcharge to its monthly telephone bills similar to

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to be equal to those charged to AT&T when that company's facility is close to an AT&T switch. See Appendix B(B)(3). This provision will remain in effect until 1991, by which time it is likely that AT&T's advantages will have been reduced by changes in the configuration of the local network. As to co-location in facilities constructed after divestiture, all carriers stand on the same footing: sharing is permitted, but not required.

[279] To be sure, the Operating Companies may impose a charge for this routing option, but not only would the charge most likely be minimal but it would also be temporary. As stated above, as soon as the FCC decides to change the national numbering plan, the entire problem will be resolved.

[280] An Operating Company would be free to provide billing services for more than one interexchange carrier; but it would not be required to do so.

[281] The divested Operating Companies will have the obvious incentive to provide billing services to the interexchange carrier with the greatest volume of calls so as to obtain the largest possible reimbursement for billing services.

the charges now imposed by interexchange carriers other than AT&T. Such a charge would be quite substantial,[282] and it would impose a significant burden upon telephone subscribers, particularly those — who are the majority of the users — whose monthly long distance bills are relatively small. It has been estimated that an additional charge of this type could double the long distance bills of many of these citizens.[283]

As indicated, the proposed decree resolves this problem by allowing the Operating Companies to engage in joint billing with AT&T. This solution would provide AT&T with an advantage over its competitors in two ways: (1) AT&T would have lower billing costs than its competitors;[284] (2) as the intercity carrier with access to Operating Company billing, AT&T might be perceived by the public as the "official" or approved intercity carrier.

As concerns the cost problem, the joint billing allowed by the proposed decree represents a reasonable trade-off: AT&T's competitors will suffer a slight competitive disadvantage, but vast numbers of consumers will benefit from lower costs as a consequence of joint billing economies. In the opinion of the Court, the public interest does not require that millions of telephone customers, particularly those with low usage (who presumably will be the less affluent) be in effect penalized by a fairly substantial extra charge in order to eliminate what to AT&T's competitors will not be a significant cost differential.[285]

The confusion that would be created in the public's mind by joint billing, and the probability that many consumers

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[282] It could be as much as five dollars per month per subscriber. Testimony of Irwin Dorros (November 24, 1981).

[283] Testimony of Irwin Dorros (November 24, 1981).

[284] AT&T would be required to reimburse the Operating Companies for the cost of billing. Proposed Decree at Appendix B(C)(2). However, this amount would presumably be less than that required if AT&T were to provide its own billing.

[285] The difference in cost is not likely to have a substantial effect on consumer choice for the high volume user which, for the present at least, appears to be the principal customer of AT&T's competitors.

would select AT&T by default simply because it appeared on the same bill with the monopoly Operating Company presents a more serious problem. However, that problem can be resolved, or at least sufficiently alleviated, without the drastic remedy of requiring AT&T to initiate its own billing operation, by allowing continued joint billing but requiring the Operating Companies to include on the interexchange portion of their bills a legend to the effect that

> This portion of your bill is provided as a service to AT&T. There is no connection between this company and AT&T. You may choose another company for your long distance telephone calls while still receiving your local telephone service from this company.

Therefore, the Court will not approve the proposed decree unless it is modified to incorporate this requirement. With this change, the degree of disparate treatment of interexchange carriers is permissible. To require more would be to place burdens upon the public not commensurate with the remaining slight disparities.

Third. The proposed decree would permit the Operating Companies to charge all interexchange carriers the same amount for access services during the interim period when AT&T still receives services superior to those provided to the other carriers. On its face, this provision appears patently anticompetitive. It will be difficult for AT&T's competitors to attract business if they are forced to pay the same amount in access charges as AT&T but receive inferior service. No persuasive justification has been given for this provision.[286] In fact, it seems clear that there should be no exception from the general rule that rates should vary depending upon costs. If therefore the cost of providing access services to the other carriers is less than that of providing access services to

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[286] AT&T states that lower costs could not be required because there was actually no difference in costs between the two types of access. See AT&T Reply Comments at 118. The Department of Justice contends that any such requirement would force the Court to value the diminished quality of access provided to AT&T's competitors. Department of Justice Brief at 35.

AT&T, the Operating Companies will have to file tariffs reflecting that difference,[287] and the Court will require that the proposed decree be modified accordingly.[288]

Fourth. Under Section I(a)(1) of the proposed decree the divested Operating Companies must be given whatever facilities are necessary to provide equal access to all interexchange and information service providers. There was considerable comment and controversy during the public interest proceedings over the use by the Operating Companies of so-called Class Four switches in the provision of such access.[289]

The switching of telephone calls in the nationwide network is divided into five functions depending upon the complexity of the switching tasks. However, a single physical unit will often perform more than one switching function. The Class Four function — the routing of toll calls — is generally regarded as a function of the interexchange network, but the physical switching unit which performs this function may be the most appropriate site for the interconnection between the Operating Companies and the other interexchange carriers.

There initially appeared to be some divergence of opinion between AT&T and the Department of Justice regarding the use by the Operating Companies of switches performing the Class Four function for the interconnection between the

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[287] If there is no difference in the cost of providing these services, it would be appropriate for charges to AT&T to be increased to reflect its higher quality connection. The Court will not impose this requirement because it lacks the expertise and flexibility to determine the amount of such a premium, but regulators remain free to insist on such a differential.

[288] The alternative chosen by the Court avoids the problems raised by the parties. See note 286 *supra*. It requires that the Operating Companies file tariffs which reflect lower rates for interexchange carriers other than AT&T only to the extent that the costs for such access are lower than the cost of access provided to AT&T. The Operating Companies will not be required to provide access services at below-cost rates, and the Court will not have to place a monetary value on the lower quality service.

[289] This matter is important because, in the view of the various intercity carriers, the Class Four switch provides the only gateway for toll quality transmission of interexchange traffic within the local exchange.

Operating Companies and AT&T's intercity competitors. The Department has always taken the position that these switches could be used for this purpose if the Operating Companies determined that this was the most efficient method for the provision of access equal in type and quality to that provided to AT&T. Response to Comments, pp. 89–92. AT&T's Reply Comments (at 107-08) suggested, however, that these switches are an integral part of AT&T's interexchange network and that the division between exchange and interexchange functions occurs at a different level of the network.[290] Ultimately, however, there was general agreement on the Department of Justice's formulation. Hearing on June 29, 1982 (Tr. 25201-03). The Court expects this principle to be implemented, both in the plan of reorganization and otherwise. See Part XI *infra*.

Fifth. AT&T's interexchange competitors have also urged the Court to withhold its approval of the decree until AT&T agrees not to seek increases in the level of Operating Company charges to interexchange carriers set by the FCC. See *Exchange Network Facilities (ENFIA)*, 90 F.C.C.2d ____ (No. 82-208, April 30, 1982), *review pending, MCI Telecommunications Corp.* v. *FCC*, No. 82-1554 (D.C. Cir.).

The ENFIA agreements were initially negotiated between AT&T and the other intercity carriers under the aegis of the FCC, and the Commission recently extended these agreements for an additional two years. *Exchange Network Facilities (ENFIA)*, 90 F.C.C.2d ____ (No. 82-180, April 14, 1982), *review pending MCI Telecommunications Corp.* v. *FCC*, No. 82-1553 (D.C. Cir.). AT&T filed new tariffs to implement that decision, but these tariffs were challenged by the other carriers. The Commission then suspended the tariffs and imposed an arbitrary interim rate to take effect until it determined the proper rate under the ENFIA agreements. It is clear from this history that the present rate is not within AT&T's discretion, but has, in fact, been set by the FCC and

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[290] According to AT&T, that division does not occur between the Class Four switching function and higher level switching functions but between local end office (Class Five) function and the Class Four function.

is under active review by the Commission and the courts. It would be improper for this Court to interfere with those proceedings.

For the reasons stated, the Court finds that, with the exceptions noted above, the equal access provisions of the proposed decree are adequate to protect the public interest.

IX
Division of Assets

Under the terms of the proposed decree, AT&T is required to divest itself of its Bell Operating Companies and to transfer to them (or to a newly-created entity or entities acting on their behalf) "sufficient facilities, personnel, systems, and rights to technical information to permit [them] to perform, independently of AT&T, exchange telecommunications and exchange access functions."[291] AT&T has proposed the following tentative procedure for effecting the reorganization required by this provision.[292] Initially, each Operating Company will establish three new subsidiaries, one for interexchange assets, another for customer premises equipment assets, and the third for directory advertising assets.[293] After the appropriate assets are transferred to these new subsidiaries,[294] each Operating Company will spin off ownership in the subsidiaries to AT&T by declaring a dividend of the new subsidiaries' stock. At the same time, AT&T will transfer to the Operating Companies, or to an entity owned by them,

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[291] Section I(A)1.

[292] Although under the proposed decree AT&T is not required to explain its procedures in this regard until it submits its plan of reorganization, it has announced this tentative proposal to inform the Court as well as other interested persons of its probable course of action.

[293] The Court has concluded that the Operating Companies may produce printed directory advertising. See Part VII *supra*. Establishment of the directory advertising subsidiary may therefore be unnecessary because those assets will be retained by the Operating Companies

[294] At the time of the transfer of assets, the Operating Companies may also transfer a portion of their debt issue to the new subsidiaries or to AT&T.

any additional assets necessary for the performance of their telecommunications and exchange access functions. Once this transfer of assets is completed, the Operating Companies will be reorganized into seven regional Operating Companies, and the stock in these seven companies will be spun off to the AT&T shareholders. See AT&T Reply Comments at 4-5; AT&T Brief at 61.

Opponents to the proposed decree claim that this method of dividing the assets is defective in several respects and they propose that the Court insist on the following modifications: (1) that AT&T be required to compensate the Operating Companies for assets removed from their balance sheets; (2) that the transfer of the assets be effected at market value rather than at net book value; and (3) that stronger procedures be established to prevent AT&T from manipulating the division of assets and liabilities to the detriment of the Operating Companies. Each of these issues is addressed below.

A. Compensation and Transfer of Assets

Those who claim that the Operating Companies should be compensated for assets transferred to AT&T misperceive both the law and the nature of the proposed reorganization. Under long-established general legal principles, the transfer of assets between a parent and its subsidiary is not an arm's length transaction for which compensation is required. Corporate law holds that such a transfer constitutes an intra-enterprise exchange for which compensation is not necessary.[295] The reason for this rule is simple: both before and

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[295] This rule applies regardless of the direction in which the transfer occurs. A transfer of assets from a parent to a subsidiary is treated as a contribution to capital for which the subsidiary is not required to provide consideration to the parent. See, *e.g.*, *United States* v. *Chicago, Burlington & Quincy Railroad Co.*, 412 U.S. 401, 405-06 (1973); *Abegg* v. *Commissioner*, 429 F.2d 1209, 1215-18 (2d Cir. 1970). The transfer of assets from a subsidiary to a parent is treated as a distribution or dividend for which likewise no compensation is required. See, *e.g.*, *Prescott, Ball & Turban* v. *LTV Corp.*, 531 F. Supp. 213, 214-15, 220 (S.D.N.Y. 1981). Apparently the only limitation on these rules is that a transfer may not impair the

after the transfer, the same shareholders maintain the same ownership interests in the same assets. The sole difference is that before the spin-off the shareholders' interests are represented by shares of stock in one company, while after the spin-off their interests are represented by shares in more than one company.

This general rule has routinely been applied to divestitures such as the one involved in these cases. For example, in *Western Union Telegraph Co.* v. *United States*, 267 F.2d 715 (2d Cir. 1959), Western Union, a carrier regulated under title II of the Communications Act, was ordered by the FCC to divest itself of its international telegraph operations as a prerequisite to a merger with another domestic telegraph company. In discussing how the company could comply with the FCC's order, the Court of Appeals stated that, should the divestiture be accomplished by a spin-off, there would be no "necessity of fixing a figure as [to] the value of the Western Union cables, since each Western Union stockholder would have the same pro rata interest in both Western Union landlines and Western Union cables following divestment, as prior to divestment."[296]

A similar approach was followed in *Pittsburgh Terminal Corp.* v. *Baltimore & Ohio Railroad, et al.*, No. 81-1674 (3d Cir. June 3, 1982). There, the C&O Railroad sought to develop its non-rail business free from restrictions imposed by the Interstate Commerce Commission, and it therefore undertook a reorganization plan similar to the one proposed by AT&T. C&O owned almost all of the common stock of the B&O

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rights of interested third parties, such as creditors. See, *e.g.*, *Superintendent of Insurance of New York* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, 12 (1971); *Pepper* v. *Litton*, 308 U.S. 295, 307 (1939); *Hanraty* v. *Ostertag*, 470 F.2d 1096, 1099 (10th Cir. 1972); *Guaranty Trust Co. of New York* v. *Grand Rapids G.H.&M. Ry. Co.*, 7 F. Supp. 551 (W.D. Mich. 1931), *mod. on reh.*, 85 F.2d 331 (6th Cir. 1936).

[296] 267 F.2d at 719-20. The fact that Western Union ultimately decided to accomplish the divestiture through a sale rather than a spin off (see *Western Union Telegraph Co.*, 30 F.C.C. 323 (1961)) in no way undermines the Court of Appeals' general characterization of a spin off as a compensation-free transfer.

Railroad, a corporation which had both rail and non-rail assets. To remove the non-rail assets, B&O created the Mid-Allegheny Corporation (MAC) as a new wholly-owned subsidiary, and it transferred to MAC all of the B&O non-rail assets in exchange for MAC stock. It then spun off ownership in MAC to its parent, the C&O, by declaring a dividend of MAC stock. At no time during the reorganization was any valuation or compensation procedure involved or required.[297] Just as it was unnecessary for the C&O to "pay" the B&O for the transfer of ownership of the non-rail assets, so, too, it is unnecessary for AT&T to compensate the Operating Companies for the transfer of those assets which are not needed for the performance of the local exchange and exchange access functions.[298]

It is worth noting in this connection that the state regulators, who are the principal opponents of the reorganization method prescribed by the proposed decree, have traditionally treated AT&T and the Operating Companies as a single enterprise rather than as separate corporations dealing with each other at arm's length.[299]

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[297] Although the Court of Appeals reversed the District Court's finding that holders of convertible debentures were not entitled to notice of the plan for reorganization, it did not in any way question the propriety of the corporate reorganization itself or the basic manner in which it was carried out.

[298] See also, *United States* v. *El Paso Natural Gas Co.*, 358 F. Supp. 820 (D. Colo. 1972), *aff'd*, 410 U.S. 962 (1973), where the court upheld a reorganization whereby El Paso transferred all of its pipeline assets at net book value to a newly-formed company in exchange for the new company's stock, then sold twenty percent of this stock, placed the remainder in a voting trust, and distributed participation certificates in the voting trust to El Paso shareholders, without any compensation between El Paso and the new company; and *United States* v. *United Fruit Co.*, 1958 Trade Cas. ¶ 68,941 (E.D. La. 1958), where the court ordered the defendant either (a) to create a new corporation capable of competing with the defendant and then to distribute the new company's stock to defendant's sh..reholders or (b) to sell sufficient assets to a third party in order that this third party could compete with the defendant.

[299] The debt-equity ratio that is used by state regulators in calculating rates of return, for example, is not that for the individual Operating

Opponents of the settlement rely on *Democratic Central Committee* v. *Washington Metropolitan Transit Commission*, 485 F.2d 786 (D.C. Cir. 1973), as allegedly requiring a different result.[300] To be sure, the Court of Appeals held in that case that capital gains realized on the disposition of assets do not automatically flow to the firm's investors but instead inure to the benefit of ratepayers,[301] and opponents of the proposed decree conclude from that holding that AT&T must compensate the Operating Companies and thus, indirectly, local ratepayers. But there is a crucial difference between the disposition of assets that was involved in that case and the transfer of assets proposed here. In *Democratic Central Committee*, the assets were taken out of operation and out of the rate base; obviously, when this occurred a gain was realized and it then became necessary to determine to

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Company being directly regulated but rather the consolidated debt-equity ratio for the entire Bell System. The reason for this approach is clear: the regulators recognize that the debt ratio of each Operating Company is the result of AT&T's distribution of its debt and equity capital among the entities in the Bell System, and that the consolidated ratio is therefore a better reflection of the Operating Company's actual financial condition. As the New York Public Service Commission said:

> Using a consolidated capital structure is correct here because AT&T and its subsidiaries conduct their financings on a centralized, coordinated basis, which leaves largely to chance the market conditions prevailing when a particular subsidiary is scheduled to issues securities.

New York Tel. Co., 23 P.U.R.4th 554, 562 (N.Y. Pub. Serv. Comm'n. 1977). See also, *Chesapeake & Potomac Tel. Co.*, 10 P.U.R.4th 211, 218 (Md. Pub. Serv. Comm'n. 1975); and *New England Tel. & Tel. Co.* 95 P.U.R.3d 71, 83 (N.H. Pub. Util. Comm'n. 1972).

[300] See also *Bebchick* v. *Washington Metropolitan Area Transit Commission*, 485 F.2d 858 (D.C. Cir. 1973).

[301] Said the court (485 F.2d at 821):

> Transit's farepayers have long been saddled with the burdens incidental to the properties in issue while they remained in operating status. Theirs were the expenses of ordinary maintenance and depreciation, and the risks of loss from casualty and obsolescence, associated with those properties . . . . And Transit's investors have profited, not only from these arrangements of burdens, but also from favorable treatment of the operating assets in other ways. By our assessment, these circumstances tip the scale in favor of Transit's farepayers, so much as to earn for them the gains beyond the shadow of a doubt.

whom the benefit of that gain should inure.[302] But no assets are here being removed from public service: the same assets will continue to be used to provide the same services to the same ratepayers, and the assets will remain subject to the same ratemaking jurisdictions of the same regulators.[303]

There can thus be little doubt that, as a matter of the law, the transfer of assets contemplated by the proposed decree is no more and no less than the usual kind of intra-enterprise exchange for which no compensation is necessary.

This result also makes sense from a practical point of view, for several reasons.

In the first place, were the Court to require AT&T to compensate the Operating Companies for the removed assets, it would in essence place AT&T in the anomalous position of having to repurchase assets it already owns. There is no warrant whatever for such a course. Second, a requirement that AT&T pay the Operating Companies for the transferred assets — which are valued at many billions of dollars — would produce a severe, if not crippling, financial strain on AT&T. Third, payment of compensation would convert what would otherwise be a tax-free transfer into a taxable exchange, thus exposing the Operating Companies to possibly

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[302] See also *Bebchick* v. *Washington Metropolitan Area Transit Commission*, *supra*, 485 F.2d 858.

[303] The FCC concurs in this position. It has advised the Court that "implementation of the proposed decree will not inevitably produce any retirement from service" of any of the Operating Companies' assets. Topic 4 Brief of FCC at 7. The proposed decree will not in any way disturb the authority of regulators to determine the proper valuation of assets regulated by their jurisdictions. For example, assets used to provide intrastate interexchange service will not be deregulated by the decree but will remain under regulation by the state commissions. These assets may simply be owned by a different corporate entity.

It is irrelevant to these proceedings that certain assets, such as customer premises equipment, may eventually be removed from public service because of eventual deregulation under the FCC's *Computer II* decision or other regulatory action. If valuation problems arise as a result of the retirement of these assets regulatory decisions; they would not stem from the proposed decree.

billions of dollars in federal and state tax liabilities. See 26 U.S.C. §§ 368(a)(1), 368(c).[304] Finally, if the transfer of assets were treated as a sale negotiated at arm's length, it is entirely possible that AT&T would decline to purchase unattractive Operating Company assets, deciding instead to purchase more up-to-date or efficient property from some third party. Since the Operating Companies would still be obligated under the terms of the proposed decree to dispose of these assets, they could conceivably be forced to sell them at greatly reduced prices — if they could sell them at all — leaving ratepayers with the obligation to produce additional revenue to compensate for the deficiency.

B. Book Value vs. Market Value

Related to the question of compensation is the question whether the transfer of assets should occur at net book value or at market value. It is not necessary to decide whether, as a matter of law, all transfers of property between a parent and its subsidiary must be effected at book value; what is clear is that, in this case, net book value is the appropriate standard.[305]

Since the mid-1940s, regulators have almost universally relied on net book, rather than market, value for ratemaking purposes. See, *e.g. Federal Power Commission* v. *Hope*

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[304] Treas. Reg. § 1.1002-1(c) (1956) holds that the underlying assumption in providing for tax-free reorganizations is that "the new property is substantially a continuation of the old investment still unliquidated; and, in the case of reorganizations, that the new enterprise, the new corporate structure and the new property are substantially continuations of the old still unliquidated." See, *e.g., United States* v. *Adkins-Phelps, Inc.*, 400 F.2d 737, 740 (8th Cir. 1968); *Commissioner* v. *Wilson*, 353 F.2d 184, 186 (9th Cir. 1965). This assumption obviously would not apply if AT&T were required to pay for the assets. The suggestion of some who object to the proposed decree that this tax liability could be avoided by an amendment of the current tax laws is entirely unpersuasive. The Court applies the laws as they now exist, not as they may some day be.

[305] There is a serious question whether a compensation-free transfer could realistically be effected other than at net book value. Further, market valuation would probably entail a number of undesirable post-divestiture consequences (*e.g.*, calculation of the rate base, taxation of the exchange).

Natural Gas, 320 U.S. 591 (1944); *Re Southern Bell Tel. & Tel. Co.*, Docket No. 78-353-C, Order No. 79-90, 30 P.U.R. 4th 263, 271 (S.C. Pub. Serv. Comn. 1979); *Re New York Tel. Co.*, Case 25155, 84 P.U.R.3d 321, 339 (N. Y. Pub. Serv. Comn. 1970); *Re Pacific Tel. & Tel. Co.*, Case No. 7409, 53 P.U.R.3d 513, 543 (Cal. Pub. Utils. Comn. 1964). This method of valuation has also consistently been used in cases involving the transfer of assets between different Bell System entities, regardless of whether the transfers were relatively insignificant (such as those involving switching equipment or other properties) or whether they involved the total reorganization of an Operating Company (such as the separation of South Central Bell from Southern Bell or the separation of Pacific Northwest Bell from Pacific Bell).[306]

Apparently the primary reason for the general preference of net book value over market value is that it is readily ascertainable,[307] while market value is much difficult to compute.[308] That reasoning has special applicability here. If market value were to be used in the instant case, valuation proceedings would have to be conducted for all of the billions of dollars worth of AT&T's assets.

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[306] See, *e.g.*, *Application of Illinois Bell Tel. Co.*, Docket 78-0121 (Ill. Commerce Comn., April 19, 1978) (sale of Illinois Bell switching equipment to AT&T at net book); *Application of Mountain States Tel. & Tel. Co.*, Docket 3999 (Tex. Publ. Utils. Comn., Nov. 13, 1977) (sale by Mountain Bell of plant to Southwestern); *Re Pacific Tel. & Tel. Co.*, Docket No. U-F-2286, 39 P.U.R.3d 132, 135-36 (Oregon Pub. Utils. Comn. 1961).

[307] It is computed simply by using the original cost and depreciation.

[308] See, *e.g.*, *Re Southern New England Tel. Co.*, Docket No. 10054, 42 P.U.R.3d 310, 320 (Conn. Pub. Utils. Comn. 1962); *Re New York Tel. Co.*, 91 P.U.R. (n.s.) 231, 257 (N. Y. Pub. Serv. Comn. 1951). Moreover, in a regulated firm, there is the additional problem of an interdependence between rates and market value. Specifically, the market value of an asset depends upon the revenue it generates, but in a regulated industry the amount of revenue is dependent on the level of rates set by regulators. As stated by the Supreme Court in *FPC* v. *Hope Natural Gas*, *supra*, 320 U.S. at 601:

> The heart of the matter is that rates cannot be made to depend upon "fair value" when the value of the going enterprise depends on earnings under whatever rates may be anticipated.

AT&T has correctly pointed out the overwhelming nature of this task by referring to the extensive, complex, and lengthy valuation proceedings in the *Conrail* case.[309] Valuation proceedings for the Bell System assets would necessarily be even more complicated and unmanageable than those involving Conrail, for the value of AT&T's assets is not only substantially greater than that of the Conrail assets, but the court there had at least the advantage of valuating assets from bankrupt estates.[310] In contrast, the Bell System is an ongoing business, and market dynamics would therefore be of much greater significance here than they were in *Conrail*.[311]

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[309] The Regional Rail Reorganization Act of 1973 mandates the transfer of assets from the estates of certain bankrupt railroads to the newly formed Conrail Corporation, and a Special Court was appointed to determine the value of the transferred assets. 45 U.S.C. §§ 743, 746. Despite the fact that the valuation proceedings for these assets began in the mid-1970s, they have yet to be completed. Indeed, the almost insuperable obstacles surrounding such proceedings led Judge Friendly to observe in 1977:

> . . . we would be remiss if we did not advise the parties and also the lawmakers of our fears as to the length and cost of these proceedings if they are carried to a conclusion under the charter that has been given us, even with the simplifying limitations we have here imposed. Nearly four years have elapsed since the Rail Act was adopted and a year and a half have gone by since the conveyances. Yet despite earnest sincere efforts by all concerned, we are only at the start of the valuation problem.

Matter of the Valuation Proceedings under Sections 303(c) and 306 of the Regional Rail Reorganization Act of 1973, 445 F. Supp. 994, 1045 (Sp. Ct. 1977). Despite the fact that over eighty percent of the case was settled by the parties, the Special Court concluded the rail-use phase of the valuation proceedings with the issuance of its 200 page opinion only in late 1981. See *Matter of the Valuation Proceedings*, 531 F. Supp. 1191 (Sp. Ct. 1981). The nonrail-use phase of the proceedings has only begun: opening briefs will not be filed until October 2, 1982, and oral argument is not scheduled until January 4, 1983. *Matter of the Valuation Proceedings*, Misc. No. 76-1, Order (Sp. Ct. July 6, 1982).

[310] Thus, the suggestion by some that the valuation process could be completed within six months (see Topic 4 Brief of People of California, *et al.*, at 35) is wholly unrealistic; and those who make these proposals are ultimately driven to the conclusion that the entire divestiture must be abandoned as impractical. Reply Brief of People of California *et al.* at 9.

[311] The suggestion that the pitfalls of the *Conrail* case could somehow be avoided by allowing the state regulatory bodies to value the assets may

The Court finds that there is no justification for abandoning the well-established practice of valuing assets at net book for purposes of the proposed decree.[312]

C. The Division of Assets and Debts

It has further been suggested by a number of interested persons that AT&T might manipulate the actual division of assets and liabilities to the detriment of the Operating Companies.

Initially it may be observed that AT&T has the responsibility, separate and apart from the proposed decree, to insure that the Operating Companies are spun off as financially viable entities. As their majority, and in some cases sole shareholder, AT&T has the fiduciary duty to protect all those with interests in these Companies, including creditors. See *Pepper* v. *Litton*, 308 U.S. at 306; see also *Superintendant of Insurance* v. *Bankers Life, supra*, 404 U.S. at 12; *Hanraty* v. *Ostertag, supra*, 470 F.2d at 1099. Other shareholders are protected by similar principles. See *Kamin* v. *American Express Co.*, 383 N.Y.S.2d 807, 812, *aff'd*, 387 N.Y.S.2d 993 (Ct. App. 1976); *United Copper Securities Co.* v. *Amalgamated Copper Co.*, 244 U.S. 261, 263–64 (1917); *Lewis* v. *Anderson*, 615 F.2d 778, 782 (9th Cir. 1979); *Rosengerten* v. *International Tel. & Tel. Corp.*, 466 F. Supp. 817, 822 (S.D.N.Y. 1979); *Auerbach* v. *Bennett*, 419 N.Y.S.2d 920, 927 (Ct. App. 1979). Antitrust principles, too, impose a duty on the divesting corporation to establish the newly-divested business with a sound financial structure. *Utah Public Service Commission* v. *El Paso Natural Gas Co.*, 395 U.S. 464, 470 (1969); *Ford Motor Co.* v. *United States*, 405 U.S. 562 (1972); *Maryland Milk Producers' Assn.* v. *United States*, 362 U.S. 458 (1960). It should not lightly be assumed that AT&T's

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readily be rejected. To permit forty-nine different forums to conduct forty-nine different proceedings would only exacerbate, not diminish, the problems.

[312] This decision of course in no way affects the authority of regulators to use a different standard in valuing assets within their jurisdiction for ratemaking purposes.

managers will violate this trust and expose themselves to substantial liability.

Beyond that, the Court is satisfied that, with some modifications, there are adequate safeguards to protect against abuse.

Perhaps the most important guarantee against improper manipulation is the one included in the proposed decree itself: that assets will be divided according to the functions they perform.[313] Thus, the Operating Companies will receive those assets necessary to perform exchange telecommunications and exchange access functions, and the remaining assets will be held by AT&T. There appears to be wide agreement that at least eighty percent of the assets may be readily identified and assigned on this basis. With respect to this portion of the assets it is therefore necessary only to ensure that the functional division will actually be carried out. A number of measures will serve this purpose.

First, in addition to its own review and approval of the division of assets, the Department of Justice has invited federal and state regulatory bodies as well as AT&T's competitors and other interested persons to examine the distribution of assets provided for in the plan of reorganization. See, *e.g.*, Department of Justice Response to Comments. at 15–21; Tr. 25,402. If it should appear that assets have been improperly assigned, the errors may be brought to the Department's attention, and it will then presumably take corrective action. Second, should the Operating Companies find, once they are divested, that they lack sufficient assets to perform their obligations under the decree, they may petition the Court under Section VII of the proposed decree for necessary relief. Third, the Court will continue its supervision of the decree, and it will in particular seek to ensure that the plan of reorganization is consistent with the decree's principles, including the principles which govern the distribution of assets. See Part XI *infra*. In view of the relatively ministerial nature of the task, these safeguards should be

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[313] Section I(A)2.

fully adequate to the ensure proper allocation of the single-function assets.

A more substantial problem is presented by the valuation of the remaining twenty percent of the assets — those representing multifunction facilities (that is, facilities providing functions for services rendered both by AT&T and by the Operating Companies). These include such important assets as land and buildings, cables, central office switching facilities, warehouses, underground conduit, manholes, and toll terminals. The proposed decree provides in Section I(A)2 that "there shall be no joint ownership of facilities, but appropriate provision may be made for sharing, through leasing or otherwise, of multifunction facilities so long as the separated portion of each BOC is ensured control over the exchange telecommunications and exchange access functions."

The parties appear to differ in their interpretation of this provision. The Department of Justice states that the entity which makes predominant use of a facility will "generally" be entitled to its ownership.[314] AT&T, on the other hand, interprets this provision to mean that multifunction facilities will be allocated on the basis of "reasonable, neutrally applied criteria," without, however, specifying what these criteria would be.[315]

In the view of the Court, it is essential that the predominant use test proposed by the government be applied to multifunction assets. Like the functional test that will be used generally in the division of assets, the predominant use test is a clear-cut standard which minimizes subjective factors and thus the potential for improper manipulation of the allocation process. Moreover, such a test provides the Court with a readily reviewable standard should the division of these facilities be called into question.[316] By contrast, the test

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[314] Department of Justice Brief at 60.

[315] AT&T Brief at 88; AT&T Reply Brief at 92. AT&T acknowledges only that predominant use will be "a major criterion" in allocating ownership of the assets. Reply Brief at 92.

[316] When this test is coupled with the provision allowing for cost-based

proposed by AT&T is vague and it leaves to that Company's management a vast amount of discretion precisely in the area where there is the most incentive for abuse. For clearly, it would be to AT&T's interest to select for itself assets of high utility and relatively low book value, while leaving to the Operating Companies the more costly but outmoded equipment, the least attractive real estate, and the under used plant. The possibility that AT&T will act on these incentives is too real to leave the distribution of the assets to AT&T's discretion under a "reasonable criteria" standard.

Because the predominant use test is an essential ingredient for the fair and successful implementation of divestiture, the Court will require in the public interest that the proposed decree be modified explicitly to incorporate that test. Such inclusion will permit the Court to oversee with some assurance of success that the division of assets will be fairly carried out.[317]

Questions have also been raised regarding the appropriate debt-equity ratios to be assumed by the Operating Companies and AT&T. AT&T has stated that it is willing to divest the Operating Companies with debt ratios of approximately forty-five percent and to assume its representative share of the outstanding debt, by assuming debt issues that have interest rates and maturities which reflect the average terms of the particular Operating Company debt.[318] The Department of Justice endorses AT&T's statement of intentions adding, however, that the Operating Companies should be left with debt issues that reflect terms and conditions comparable to the debt held by the Bell System as a whole. Department of

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leasing, it will assist in the division of multifunction facilities in a manner that is fair to both AT&T and the Operating Companies. Section I(A)2.

[317] The required modification will provide the necessary flexibility in the event it is determined that in certain instances the predominant use test is inappropriate. See Part XII *infra*.

[318] AT&T has stated that it will do so either by assuming a proportion of each debt issue or by assuming all of certain debt issues that have appropriate rates and maturities. See AT&T Reply Comments at 76-80; AT&T Brief at 90; AT&T Reply Brief at 95-96.

Justice Response to Comments at 30; Department of Justice Brief at 62.

The Court sees no reason for rejecting the parties' plan. The suggestions made by various third persons[319] do not differ significantly from those submitted by the parties, and they have certainly not shown that the parties' proposals are at all unreasonable. However, as is true with respect to several other matters, the Court considers that its Tunney Act responsibilities require it to demand more of the parties on subjects which have significant public interest aspects than statements of intentions embodied in briefs or written comments, or made during oral argument. Accordingly, the Court will require that the proposed decree be modified to incorporate the forty-five percent debt ratio[320] and the government's and AT&T's representations with regard to the quality of the Operating Company debt,[321] to the end that on the basis of such a modification the Court will be in a position, if necessary, to insist that the statements of intention of the parties are actually implemented.

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[319] These persons have proposed different alternatives: some contend that no Operating Company should have a debt ratio over 50 percent; others that the Operating Companies should be spun off with the same debt ratio they had before divestiture; still others argue that, regardless of what ratio is chosen, it should be the same for all the Operating Companies so as to ensure that after divestiture they will have equal opportunities to attract new financing.

[320] Pacific Telephone currently has a substantially higher debt-equity ratio (at about 75 percent) due in large part to the actions of California's regulators. The Court will not require AT&T to reduce Pacific Telephone's debt to 45 percent, but will accept a reduction of Pacific's debt to around 50 percent. This 50 percent ratio appears to be acceptable to the State of California. See Topic 4 Brief of the State of California at 38.

[321] In actual practice, there may be a distinction between the Department of Justice's proposal regarding the quality of the debt and that of AT&T. The Court expects that the plan of reorganization will provide each Operating Company with a debt portfolio that reflects the terms and conditions comparable to the debt held by the Bell System as a whole unless it can be shown that, with respect to a particular Operating Company, its own current debt provides a more equitable basis. In the event of a dispute, the chief executives of the new regional Operating Companies may be heard regarding this subject.

The Court is satisfied that the provisions in the proposed decree, as modified, along with traditional corporate principles, provide a sound framework for the division of the assets and of the debt. The interests of the Operating Companies, including those of its creditors and future shareholders, will be protected by the functional division of assets, the predominant use test for multifunction facilities, and the guidelines established for the division of the corporate liabilities. The procedures established for the review of the reorganization plan and its implementation will further help to ensure that the principles of the decree be carried out. See Part XI *infra*. Finally, the fact that AT&T has a fiduciary obligation, separate and apart from the decree, to approach the divestiture in good faith and to protect the interests of all involved will further help to guarantee that the division of assets will be carried out in the public interest.

X

Special Provisions and Concerns

A number of those who have commented on the proposed decree have raised special problems which are outside the scope of the general categories discussed above. The Court has considered all of the issues presented by these comments, and it finds that none constitutes grounds for withholding approval of the proposed decree. Five of the most important concerns are discussed below.

A. Department of Defense Concerns

The comments of the Department of Defense indicate continued opposition to the concept of the divestiture of the Operating Companies, and they suggest that the Department prefers an integrated AT&T as a defense asset.[322] These

[322] Thus, the Department states that the features of the integrated Bell System "have led us to express our view that divestiture of major components of the Bell System particularly structural separation between the local exchange and interexchange functions, would adversely impact system integrity and the Bell System's current ability to promptly provide emergency communications support and restoration." Department of Defense Comments at 16; see also, *id.* at 24.

comments ignore the testimony adduced during the *AT&T* trial, much of it by witnesses with close ties to the Defense Department,[323] to the effect that, far from relying directly or even primarily on AT&T, the Department and its allied agencies have in recent years increasingly placed their trust in their own, or in other non-AT&T sources for their communications needs.[324] In any event, the Department now appears to recognize that its stated interests cannot override the government's basic divestiture decision, and it thus concentrates the bulk of its remarks on recommendations for achieving a telecommunications network that will be effective for national defense and emergency purposes once divestiture is accomplished.

Some of these recommendations require no action by the Court because they address matters of definition;[325] request the resolution of conflicts that are theoretical at best;[326] or discuss problems which have little to do with the settlement.[327] However, there is one series of comments that has substantial merit.

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[323] *E.g.*, Secretary of Defense Harold Brown (December 17, 1981); former Deputy Secretary of Defense David Packard (November 6, 1981); Gerald P. Dineen, former Deputy Undersecretary of Defense for Research and Engineering (December 16, 1981); and former Air Force general Lee M. Paschall (November 6, 1981). All these individuals were called as witnesses on behalf of AT&T.

[324] See, *e.g.*, the trial testimony of Dr. Dineen at Tr. 24538-39; General Paschall at Tr. 19699-711. Bell Laboratories continues to be an important supplier of sophisticated equipment to the Defense Department; however, the divestiture does not disturb its relationship to AT&T.

[325] *E.g.*, whether such concepts as "emergency" and "customer premises" are adequately defined.

[326] The proposed decree provides (in Section I(C)) that until 1987, AT&T shall provide research and development services to the Operating Companies on a priority basis, while under the Defense Production Act, 50 U.S.C.A. App. § 2061 *et seq.*, priorities may be assigned to contracts necessary or appropriate to the national defense. There is no reason why AT&T cannot satisfy both requirements.

[327] The Department complains (Comments at 27–31) that inter-exchange carriers, but not customers of telecommunications carriers, are given the benefit of the provisions which prohibit the Operating Companies from

The Department notes that Section I(B) of the proposed decree directs the Operating Companies to "provide, through a centralized organization, a single point of contact for coordination of BOCs to meet the requirements of national security and emergency preparedness," and it correctly observes that there is no elaboration on the purpose and scope of the "single point of contact" requirement. The Department focuses on five specific areas in this regard, three of which constitute legitimate subjects of concern: (1) the lack of a requirement in the proposed decree that the Operating Companies commit specific resources to this point of contact; (2) the question of funding and regulatory treatment for this facility; and (3) the degree of authority the facility would possess to instruct the Operating Companies to cooperate in emergency situations, particularly in regard to the assignment to each other of necessary resources.[328] The Court expects that AT&T's plan of reorganization will resolve these issues in a manner which satisfies the Defense Department's legitimate needs without impairing the basic antitrust purposes of the judgment.[329]

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discriminating in providing access. The proposed decree addresses a real problem: that the Operating Companies, because of their past ties to AT&T, might give special consideration to their former parent. It is difficult to believe that the Operating Companies would have an incentive to discriminate against their customers, particularly large customers such as the United States government.

[328] A fourth recommendation is that AT&T be authorized and required to participate in the planning, administration, and operation of this "single point of contact" or any centralized administrative entity the Operating Companies may establish. The proposed decree quite properly rejects that concept since it would be antithetical to the basic theory and purpose of the decree. Similarly unacceptable, and for the same reasons, is the Defense Department's request that the Operating Companies be permitted to engage in coordination beyond the needs of national security and emergency preparedness.

[329] Since the subjects covered in this section of the opinion concern intragovernmental matters, the Court assumes that accommodations can be worked out between the Department of Justice and the Department of Defense without the need for specific modifications of the decree. However, the Department of Defense will be afforded an opportunity, following the submission of the reorganization plan, to submit further comments to the

B. Interests of AT&T Employees

The Communications Workers of America[330] submitted both comments and briefs, stating that it favors approval of the proposed decree. Its primary interest is in continued national bargaining in telecommunications following the reorganization of AT&T, and it requests that the proposed decree explicitly provide that nothing therein will preclude such a procedure. In the view of the Court, there is no need for such a modification. There is nothing in the proposed decree or in general principles of law which would preclude or interfere with such bargaining, and there accordingly is no reason whatever why, following the entry of the decree and the reorganization, such bargaining cannot continue as in the past.

The Communications Workers have further advised the Court that in August 1980 the union entered into a memorandum of understanding with AT&T[331] which specified that employees of the Bell System who were transferred to separate AT&T subsidiaries or affiliates would be entitled to certain protections.[332] Again, it is clear that, notwithstanding the separation of the Operating Companies from the Bell System, there will be no obstacle either to adherence by any of the restructured segments of the Bell System to the terms

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Court, should it be dissatisfied with the arrangements made by AT&T and the Department of Justice.

[330] This labor union represents over 500,000 employees of the Bell System, or 51 percent of all of the System's employees, in addition to over 70,000 employees in other telecommunications companies.

[331] This was done in anticipation of the establishment of separate subsidiaries or affiliated entities, presumably by requirement of the FCC.

[332] These include the preservation of wages and net credited service of transferred employees for five years after the transfer; no reduction of pension, health, or other benefits as a result of the transfer; payment of reasonable travel and moving expenses for transferred employees; continued application of the collective bargaining agreement to these employees; preferential rehiring rights; advance notice to the union of any work group transfer; and continued recognition by the subsidiaries or affiliates of the Communications Workers of America as the exclusive bargaining representative of transferred employees.

of existing collective bargaining agreements or to their abiding by such memoranda of understanding as may have been or may hereafter be negotiated with the union.[353]

The purpose of the divestiture is to establish conditions which will prevent the type of anticompetitive activities which the government has charged in its complaints in the two lawsuits presently before the Court. These activities, and hence the settlement of the lawsuits, do not involve AT&T's labor relations and, more particularly, they have nothing to do with the Communications Workers of America or its relationship with the Bell System. See also, 15 U.S.C. § 17; 29 U.S.C. § 52. It follows that the union, on the one hand, and AT&T, and the divested Operating Companies, on the other, will be entirely free to arrange their mutual labor relationships as the Bell System and the union did in the past, irrespective of the structural changes that may be brought about by the decree.

C. Prima Facie Effect of the Decree in Private Litigation

Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a) provides that

> a final judgment . . . rendered in any . . . proceeding brought by . . . the United States under the antitrust laws to the effect that a defendant has violated such laws shall be prima facie evidence against such defendant [in a private action] as to all matters respecting which said judgment would be an estoppel as between the parties thereto.[354]

Several parties argue that they are entitled to the benefits of the presumption established by this provision in any suits they may have brought or may hereafter initiate against

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[353] Obviously, the divested Operating Companies and other successor AT&T entities may subsequently negotiate superseding collective bargaining agreements with the majority representatives of their employees.

[354] The statute goes on to provide that it does not apply to consent judgments entered before any testimony is taken.

AT&T charging conduct similar to that involved in the government's *AT&T* action presently before this Court.[335]

AT&T presents two arguments in opposition to this suggestion.[336]

First, it contends that the proposed decree is only a modification of the 1956 decree, and that, since that decree was entered before any evidence had been taken in the *Western Electric* case, section 5(a) of the Clayton Act does not apply by its own terms. See note 334 *supra*. The Court has rejected this highly artificial argument in other contexts (see Part I *supra*) and it again rejects it here. The parties may not escape either the mandate of the law or the possibility of liability by the transparent device of attaching their settlement to an old, largely dormant case rather than to an action that is currently in litigation, especially where almost the entire settlement relates to the current lawsuit.

AT&T's second argument has considerably more merit. As indicated, the statute establishes a presumption usable in private litigation only on the basis of a judgment "to the effect that a defendant has violated [the antitrust] laws." Not only does the proposed decree fail to include a finding or admission that AT&T has violated these laws,[337] but Section III of the decree specifically provides that the judgment "shall

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[335] Other parties suggest that the Court should not enter the judgment without first making specific findings that might be used by private parties in subsequent litigation. There is no warrant for such findings. Although the vast majority of the evidence has been adduced, the trial has not been concluded, and the Court would therefore not be justified—absent a waiver by the parties or their refusal to produce additional evidence—to make findings of fact. See, *e.g.*, *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968); *Emich* v. *General Motors Corp.*, 340 U.S. 558, 566–72 (1951).

[336] The Department of Justice appears to take a position only on the second of AT&T's arguments. See Department of Justice Response to Comments at 134–36.

[337] Likewise, nothing in this opinion is intended to constitute a finding of violation of the antitrust laws.

[not] constitute any evidence against, an admission by, or an estoppel against any party or [Operating Company]." In view of that unequivocal provision, it would appear to this Court that the judgment herein would not have a prima facie effect in private litigation. However, as the Department of Justice correctly points out, the ultimate decision with respect to this issue must rest with the court in which such litigation may be brought. Response to Comments at 136. The Court will therefore decline to enter any specific decision or finding regarding this subject.

D. Conflict with Federal Regulation

Several interested parties have suggested that there may be a conflict between the proposed decree and regulation by the Federal Communications Commission, and that the decree therefore should not be entered unless and until the Commission has given its formal approval.

It is true that FCC certificates are required under the Communications Act for a number of transactions necessary to implement the divestiture. See 47 U.S.C. § 214(a), 221(a), 310(d). It is not likely, however, that a controversy will actually arise with respect to any of these matters. The FCC has already declared that "the basic settlement appears to be fair and reasonable," and it has suggested throughout its participation in these actions that there will be no difficulties with regard to implementation. Brief of FCC as amicus curiae at 9. The Supreme Court has admonished the lower courts not to adjudicate potential conflicts between an antitrust decree and a federal regulatory statute until there is a concrete case or controversy in that respect. *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 377 (1973). Accordingly, the Court need not and will not decide specific questions of possible conflict at this time.

The Federal Communications Commission has suggested in a somewhat similar vein that the decree should accommodate the federal regulatory scheme by the addition of a clause modeled on the so-called *Terminal Railroad* proviso. In *United States* v. *St. Louis Terminal*, 224 U.S. 383 (1912)

the Supreme Court directed the entry of a decree which, *inter alia*, changed some billing practices and eliminated a special charge for certain types of rail traffic. Because of a concern that these provisions created a potential conflict with Interstate Commerce Commission regulation of interstate rail transportation, the Court ordered that a proviso be attached to the effect that the decree did not affect the ICC's powers. 224 U.S. at 412. The District Court entered a decree in conformity with the Supreme Court directive (see *Terminal R.R. Ass'n* v. *United States*, 266 U.S. 17, 25 (1924)); and it is a clause paralleling that decree that the FCC requests here.

It is not at all clear why the FCC asks for inclusion in the decree in these cases of the *Terminal Railroad* proviso. The Commission acknowledges that

> The addition of such a provision would not change the substance of the proposed [decree]. There is no reason to suppose that either party to the settlement ever intended to affect any Commission power. Moreover, the failure to add such a proviso would not expand the court's power or contract the Commission's power.

Brief of FCC as amicus curiae at 27–28.

The only reasons given for the FCC request is that, by adding the proviso, the Court would avoid misunderstandings, and that to do so would comply with the Supreme Court's expressed preference for conditional decrees.

The addition of a clause which, by the Commission's own concession, would have no effect either on the authority of the Commission or that of the Court, is more likely to create misunderstandings than to eliminate them. As for the alternate argument, the Court does not view the requirement of a proviso in a case decided sixty years ago under totally different circumstances to constitute an adequate reason for adding a similar clause here.

The Court has recognized and discussed the jurisdiction of the FCC ever since its opinion of September 11, 1978. *United States* v. *AT&T*, *supra*, 461 F. Supp. 1314. As the Court

then decided, and subsequently reiterated,[338] none of the activities of AT&T which is the subject of these lawsuits is immunized from the antitrust laws by virtue of FCC regulation. The Court has also noted that there is no reason to anticipate a conflict between the decree and federal regulation, but that if such a conflict arose, it appeared likely that, in view of the Commission's limited authority in regard to structural matters in the telecommunications industry, the judgment of an antitrust court would prevail. *Cf.* Part III *supra*. Indeed, the FCC itself has conceded herein that it has limited authority with respect to the structure of the telephone industry. Memorandum of the FCC as amicus curiae in *United States* v. *AT&T*, reprinted at 62 F.C.C.2d 1102, 1117-18 (1977). For these reasons, a modification of the proposed decree along the lines requested by the FCC is unnecessary.

E. Cincinnati Bell

The Ohio Office of the Consumers' Counsel and the City of Cincinnati, object to Section I(A)(3) of the proposed decree which requires termination of the license contracts, including the one with Cincinnati Bell.[339] These entities argue that in 1903, AT&T made an agreement[340] with Cincinnati Bell pursuant to which AT&T received approximately 29 percent of Cincinnati Bell's common stock[341] in exchange for a com-

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[338] See *United States* v. *AT&T*, 524 F. Supp. at 1357-60.

[339] Cincinnati Bell is covered by the proposed decree notwithstanding the fact that it is not one of the twenty-two Operating Companies to be divested because Section I(A)(3) of the proposed decree calls for "the termination of the License Contracts between AT&T and the BOCs and other subsidiaries." Section IV of the proposed decree, in turn, defines subsidiary as "any organization or entity in which AT&T has stock ownership, whether or not controlled by AT&T." Thus, these provisions include Cincinnati Bell as well as the Southern New England Telephone Company.

[340] The minutes of a Board of Directors meeting are alleged to substantiate their claim.

[341] There is some question whether the stock was worth $70 million or about one-half that amount.

mitment by AT&T to provide Cincinnati Bell with the benefits of the license contracts in perpetuity. The proposed termination of all license contracts, including the one pertaining to Cincinnati Bell, is claimed to constitute a confiscation of the stock and a windfall to AT&T.

The Justice Department responds that negotiations between AT&T and Cincinnati Bell are under way to resolve this issue (Response to Comments at 38, n. *) and AT&T states that the license contracts will be terminated "on a reasonable and equitable basis," but that if Cincinnati Bell is dissatisfied with the outcome, it may bring a separate action and assert whatever contract remedies it may have. AT&T Reply Brief at 120, n. *.

The Court regards these responses as adequate, particularly because Cincinnati Bell itself has not complained of the termination of the license contracts or indicated that it expects the current negotiations to prove unsatisfactory. It may well be that the issue will, in fact, be resolved amicably between Cincinnati Bell and AT&T. If, after the plan of reorganization is submitted, Cincinnati Bell is dissatisfied with the terms of the termination, it may raise the issue,[342] and the Court will then determine whether the matter is appropriately addressed in the context of the reorganization or by way of a separate legal action.

XI
Future Proceedings

The Court has received a number of comments urging it to hold a variety of future proceedings in connection with the implementation of the proposed decree. Some go so far as to suggest that the Court withhold its approval of the decree until the contents of the reorganization plan are known; others argue more simply that the decree be modified to include mechanisms for Court and third-party involvement in both the implementation and the enforcement of the decree; still others contend that the Operating Companies be immediately

[342] See Part XI *infra*.

drawn into the public interest process on an independent basis. Each of these issues is discussed below.

A. Deferral of Approval of the Judgment

It has been widely contended that the Court should defer either approving or disapproving the parties' proposal, or that, at a minimum, it should grant only tentative approval until it has had an opportunity to review AT&T's plan of reorganization. Implicit in these suggestions is the premise that it is not possible now to determine whether the broad principles set forth in the proposed decree, even if fully implemented, comply with the Tunney Act's public interest standard, and that a *de novo* public interest evaluation must therefore be conducted after the plan of reorganization has been submitted.

There is no sound basis for such a course. Although, as discussed above, many important questions are left unresolved, the proposal does set forth the principles of the parties' agreement with sufficient particularity that the Court is able to make a decision now on the question of whether a judgment based on these principles would be in the public interest. Moreover, a deferral of approval or a grant only of tentative approval — essentially on the theory that once implementation begins, entirely new problems of concern to the public in general or to specific interests may emerge — would be unfair to the parties and to the public.

As AT&T correctly points out, "[d]elay holds the most serious consequences for the operation of the network and can only multiply the costs of uncertainty that have plagued the industry far too long."[343] Such a delay would disrupt AT&T's own operations; it would inhibit investment and other business decisions necessary to the maintenance and improvement of the telecommunications network; it would jeopardize the ability of the Bell System's components to raise the outside capital needed for the modernization and expansion of their network; and it would adversely affect the entire

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[343] AT&T Reply Comments at 3.

telecommunications industry, and thus indirectly, the nation as a whole.

Because the principles set forth in the decree are specific enough for the Court to make its decision, and because delay, with all its adverse consequences, is unwarranted, the Court will not defer its ruling on whether the proposed decree is in the public interest.

This decision means, of course, that if the parties accept the Court's modifications, the decree as modified will be approved as being in the public interest, and the Court will be unable at some later stage to add new and different provisions.[344] It also follows that the enforcement procedures adopted herein (see *infra*) will be designed only to permit the Court to protect the provisions and principles of the judgment, as entered, against non-compliance and non-enforcement.

B. The Court's Continuing Enforcement Authority

Although the principles underlying the proposed decree are clear, they are in several respects sufficiently general in nature that they could be implemented by the parties in a number of different ways.[345] As to some of these provisions,

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[344] This limitation is without prejudice to the exercise by the Court of authority to modify the judgment stemming not from the decree itself but from general principles of law.

[345] For example, section IV(G)(1) provides that the local exchange areas shall be drawn in such a way as to take account of "common social, economic, and other purposes, even where such configuration transcends municipal or other local governmental boundaries." It is nowhere spelled out what those conditions might be, or how they would be established, defined, or demonstrated. AT&T would thus be wholly free to draw the exchange area boundaries so as to further its own interests at the expense of those of the Operating Companies, at the expense of its various interexchange competitors, or both.

Similarly, section I(A)(1) provides that "sufficient facilities, personnel, systems, and rights to technical information" will be assigned by AT&T to the Operating Companies so as to permit them effectively to perform the functions assigned to them under the judgment. This clause, too, is more precatory than mandatory, more broad than precise, and in particular it

the parties have provided the Court with assurances regarding the approach they will follow.[346] As to others, only their future conduct will reveal whether the principles of the proposed decree are being followed.

The Court's public interest determination necessarily rests on the premise that the parties' assurances will be fully carried out and that the other principles included in the decree will be implemented in the manner most consistent with its purposes. However, no one can know at this time whether this premise is well taken, and it is therefore imperative that the Court retain the power to ensure that the parties comply in full with the principles mandated by the decree, both in formulating the plan of reorganization and in their conduct after divestiture.

The parties provide somewhat differing explanations as to why the Court should be unconcerned about the decree's implementation. AT&T badly states that the Tunney Act authorizes the Court only to approve the decree, not "to assure that it will in fact be implemented."[347] That contention betrays a complete misunderstanding of the purpose of the

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leaves to AT&T wide discretion in the assignment and the configuration of common facilities. As indicated in Part IX, *supra*, the multifunction facilities represent, by the parties' own estimates, about twenty percent of the total Bell System assets — meaning that they have a value of some $20 billion. Unless more definite guidelines are set, there is an obvious and substantial incentive and opportunity for manipulation by AT&T.

[346] Among these principles are the following: (1) AT&T will grant to the Operating Companies on a royalty-free basis all existing patents and all patents to be issued for a period of five years following entry of the judgment; (2) the chief executives of the seven new Operating Companies will have full independence, without interference, from AT&T to provide to the Court their views regarding the plan of reorganization and otherwise; (3) switches providing Class Four functions will be available for the interconnection of AT&T's interexchange competitors if the Operating Companies conclude that this is the most efficient method of effecting the interconnection; (4) the "single point of contact," organized to meet national security and emergency preparedness needs will be sufficiently funded and supported; and (5) the local exchange areas will be drawn in accordance with objective principles and without discrimination.

[347] AT&T Reply Brief at 132, note **.

Act and of the Court's equitable responsibilities. The Congress was concerned with the ever-present possibility of collusion between the Department of Justice and antitrust defendants, with their vast economic and political powers, and for that reason it interposed the Court's public interest authority between the parties and the entry of consent decrees. But that procedure would be largely meaningless if AT&T's understanding of the proper role of the Court were correct. Upon that view, the parties could simply enter into a consent decree which easily passed muster in the public interest proceeding, and then proceed with its implementation, or nonimplementation, without fear of judicial interference. The Court rejects so self-defeating a construction of the law and of its responsibilities.

The Department of Justice's response is more sophisticated but no more satisfactory. The Department states that it will "be fully aware of all aspects of public concern"; that it will "review the plan of reorganization to ensure that [appropriate] arrangements are made"; and that the proposed decree properly "places [sole] responsibility for approval of divestiture in the Department of Justice."[348] In addition, counsel for the government have argued with some vigor that they are committed to this settlement and will do their best to implement and enforce it. The Court does not in the least doubt the good faith of the particular individuals involved. But this is not a matter of personalities — either the Court's or those of specific Justice Department officials[349] The Tunney Act is addressed to institutions: the Congress determined, for reasons it considered good and sufficient, that, on balance, antitrust settlements involving the government shall be sub-

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[348] Department of Justice Brief at 96-99. But the Department has acknowledged that the Court has a legitimate interest in retaining jurisdiction to assure that the plan of reorganization does not depart from the principles in the judgment. See pp. 159–60 *infra*.

[349] Individuals, of course, come and go. What has remained and is likely to remain constant are AT&T's self-interest and its desire to secure from government officials favorable interpretations of laws, rules, regulations, agreements, and understandings; and the possibility that political or other influence may effectively be brought to bear on public officials.

ject to the scrutiny of the Judiciary. The Court intends to see to it that this mandate is fully implemented in this case.

During the congressional hearings which led to enactment of the statute, the Department of Justice officials argued — just as they do here — that internal Department procedures were adequate to protect the public interest and that judicial involvement was for that reason unnecessary.[350] The Congress rejected that approach in favor of requiring the courts to become active participants in the process.[351] In light of that legislative determination, it would be inappropriate and insufficient for courts to rely exclusively on a Justice Department review as providing an adequate assurance that a consent decree will be implemented in a manner consistent with the public interest.[352]

The procedures requisite for the protection of the public interest necessarily depend upon many different circumstances — which is precisely why the Congress left to the courts' discretion the means by which their public interest responsibilities would be effected. There are several reasons why judicial scrutiny and enforcement beyond the entry of judgment stage is especially necessary in these cases.

First. Whether this decree will, in fact, provide the benefits which underlie the Court's public interest determination depends upon (1) the provisions of the plan of reorganization and (2) the extent to which AT&T and the divested Operating Companies comply with the requirements of the decree

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[350] Senate Hearings, *supra*, note 72, at 90-91, 103-04 (Assistant Attorney General Thomas Kauper); *Consent Decree Bills: Hearings on H.R. 9023, H.R. 9947 and S. 783*, *supra*, note 72 at 62, 71-73, 84-85 (Deputy Assistant Attorney General Bruce Wilson.

[351] See Part II *supra*.

[352] The parties contend that in other cases courts have been content with less than what they have presented here, and that they have not required approval of detailed implementation plans. In fact, consent decrees commonly include clauses requiring judicial approval of plans of reorganization. See, *e.g.*, *United States* v. *American Optical Co.*, 1966 Trade Cas. ¶ 71,781 (E.D. Wis. 1966); *United States* v. *United Fruit Co.*, 1958 Trade Cas. ¶ 68,941 (E.D. La. 1958).

applicable even after the completion of the divestiture.[353] To preclude Court review of these activities would thus be to do precisely that which Congress sought to prevent.

Second. This particular settlement, and this particular consent decree, are of extraordinary magnitude and complexity. The decree will effectuate the largest, most complicated divestiture since the passage of the Tunney Act, if not in all of American legal history. It will not only provide for the reorganization of the largest corporation in the world, but it will also affect the entire telecommunications industry, the computer industry, the dissemination and publication of information, foreign trade, national defense, and thus the interests of literally millions of individuals — ratepayers, AT&T competitors, creditors, employees, stockholders and bondholders, and ordinary American citizens who are dependent upon the telephone for their private or business interests. It would be wholly inappropriate in that kind of situation for the Court to allow the parties to exercise unreviewable discretion over future implementation and enforcement.

Third. The Court has recounted how AT&T and various departments of the government, in particular the Department of Justice and the Department of Defense, have cooperated since the 1950s in a manner that does not instill confidence that their sole motivation and purpose was the protection of the public interest. See Part I *supra*. In view of that history, and in view of the mandate of the Tunney Act, the Court would be derelict in its duties if it relied upon Department of Justice enforcement alone for the protection of the public interest following the signing of the judgment itself.

For all these reasons, it is the Court's conclusion that the purpose of the Tunney Act will be fulfilled only if judicial

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[353] For example, AT&T and its affiliates are required under Section I(C) of the proposed decree to provide research, development, manufacturing, and other support services to the Operating Companies; and pursuant to Appendix B of the proposed decree, the equal exchange access for all interexchange carriers must be provided by September 1, 1986.

scrutiny and enforcement do not cease with the entry of judgment.

It is unclear whether the decree itself vests in the Court the requisite authority *sua sponte* to enforce the judgment, for the parties to the litigation have taken ambiguous and inconsistent positions on this question. By its terms, the proposed decree grants enforcement power only to the parties to the lawsuit (and after divestiture to the Operating Companies), apparently to the exclusion of the Court acting *sua sponte*.[354] The Department's Competitive Impact Statement likewise strongly suggests[355] that only the parties possess such power, and AT&T's briefs are even more emphatic in asserting that "*sua sponte* action by the Court would be unnecessary and unprecedented," and that various commentors are wrong in assuming that "*sua sponte* enforcement action by this Court would be proper." AT&T Brief at 117; AT&T Reply Brief at 133-34.

On the other hand, the Department of Justice has acknowledged elsewhere that, after the judgment has been entered, the "Court will then have the authority to ensure that any actions taken are consistent with the [judgment], and the attendant powers to hold hearings, appoint experts and seek assistance by appropriate means from interested parties." Response to Comments at 15. The Department went on to state that, since the Court would retain jurisdiction pursuant to Section VII of the decree, it would be able on its own motion to initiate proceedings to enforce its provisions,[356] and it further observed that "the Court would retain jurisdiction

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[354] Section VII of the proposed decree provides that

> [j]urisdiction is retained by this Court for the purpose of enabling any of the parties to this Modification of Final Judgment, or, after the reorganization specified in Section I, a BOC to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Modification of Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violation hereof.

[355] Competitive Impact Statement at 38.

[356] Department of Justice Response to Comments at 136-37.

to assure that the plan of reorganization ultimately approved by the Department of Justice does not in any substantial way depart from the [judgment's] principles — principles that the Court would have approved and hence mandated."[357]

These confusing and somewhat contradictory interpretations do not provide a firm basis for the Court's action *sua sponte* to initiate enforcement proceedings. If such authority is to be found, it will have to be elsewhere than in the present language of the proposed decree.

Some such authority already exists through the law of contempt. Although civil contempt proceedings may probably[358] be initiated only by a party or parties with an interest in the decree, a court may enforce its own judgments by means of criminal contempt even if there has been no request from a party. *MacNeil* v. *United States*, 236 F.2d 149 (1st Cir. 1956). See also *United States* v. *Barnett*, 346 F.2d 99 (5th Cir. 1965); *United States* v. *International Union*, 190 F.2d 865 (D.C. Cir. 1951); *Fletcher* v. *United States*, 174 F.2d 373 (4th Cir. 1949); *Palmigiano* v. *Garrahy*, 448 F. Supp. 659 (D.R.I. 1978).

There is, however, a glaring defect to the criminal contempt option as a means of enforcing the decree as it is presently drafted: many of the enforcement problems that are likely to arise may be expected to stem from the broad principles set forth in the decree rather than from narrowly-defined, precise provisions. Yet criminal contempt sanctions as a rule may be imposed only for clear-cut violations of very specific judgments or orders. Thus, unless the proposed decree is modified to

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[357] Competitive Impact Statement at 17. To confuse the parties' positions even further, counsel for the Department suggested during oral argument that under the decree the Court could act on its own motion, but only in the event that the Department had failed in bad faith to undertake its own enforcement efforts. Hearing on June 30, 1982, Tr. 25445-47.

[358] It may be that, in a case of this kind, where the Court has in effect placed its imprimatur on the decree by virtue of a comprehensive public interest proceeding, it would be a party in interest with sufficient standing for civil contempt purposes. It is not necessary to come to a definite conclusion on this matter at this time.

allow for the entry of such orders in implementation of the decree's principles, the Court would probably be left without any realistic means of redressing the difficulties that are likely to arise in the implementation phase of the judgment. For the reasons stated, this would not be in the public interest.

The Court will accordingly require as a condition of its approval of the proposed decree that it be modified (1) to require Court approval of the plan of reorganization and (2) to confirm the Court's authority to initiate enforcement proceedings *sua sponte*. These modifications will enable the Court both directly to enforce specific provisions of the decree and to issue orders construing its principles in more specific terms so that, if there is a violation, sufficient grounds will exist for the entry of further enforcement orders or the imposition of appropriate punishment.

C. Status of Third Parties

A number of individuals as well as several governmental and private entities have sought to intervene in these proceedings.[359] Although the Court rejected all these requests at the time they were made, it did, in its order of May 25, 1982, invite interested parties to advise it of the status they sought with respect to further proceedings.[360] In response to that invitation, a number of interested persons and organizations replied that they wished to be granted status as intervenors, and they generally suggested that this should

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[359] See notes 60-61 *supra*.

[360] Specifically, the Court's memorandum stated that

> Interested persons shall indicate (1) whether they request participation as intervenors, amicus curiae, or in some other capacity; (2) whether such status would be limited to certain topics or phases of the proceedings; (3) what specific powers they would expect to be able to exercise (*e.g.*, present evidence, file procedural motions or counterclaims, take appeals, acquire the right to veto the settlement); and (4) why such status and such powers are necessary for the safeguarding of their legitimate interests and appropriate in the circumstances of this case [citing a previous Court memorandum].

Order filed May 25, 1982, at 5.

include the right to present evidence, to call and cross-examine witnesses, to file procedural motions and counterclaims, and to take appeals.[361]

It is clear from the language of the Tunney Act, its legislative history, and from the cases[362] that there is no right to intervene; to the contrary, Congress intended intervention, and the scope of the intervention if allowed, to be discretionary.

The Tunney Act provides that in making its public interest determination, "the court *may* . . . authorize full or limited participation in proceedings before the court by interested persons or agencies, including . . . intervention as a party pursuant to the Federal Rules of Civil Procedure." 15 U.S.C. § 16(f) (emphasis added). Nothing in the legislative history of the Act or in any decision construing it lends support for

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[361] No one asserted a sufficient reason for receiving a right to veto the settlement. There was little response to the Court's inquiry as to the need for intervention or its appropriateness in the circumstances of these cases.

[362] There are no court decisions holding that the Tunney Act grants a right to intervene. Decisional law prior to passage of the Act is generally to the same effect. One exception is *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967), but it involved a unique fact situation. The Supreme Court had ordered divestiture as part of its decision on the merits but no action had been taken to carry out the mandate. Instead, the parties filed a consent decree which did "the opposite of what [the Court's] prior opinion and mandate commanded." *Id.* at 142. In that posture, the Court found a right to intervene. The cases are virtually unanimous in limiting the *Cascade* decision to its peculiar facts. For example when a third party sought to intervene in the *Western Electric* case, the court denied the application, finding *Cascade* to be limited to its "extraordinary circumstances," and that decision was affirmed by the Supreme Court. *United States* v. *Western Electric Co.*, 1968 Trade Cas. § 72, 415 (D.N.J.), *aff'd*, 392 U.S. 659 (1968). See also *United States* v. *Associated Milk Producers, Inc.*, 534 F.2d 113 (8th Cir. 1976); *Smuck* v. *Hobson*, 408 F.2d 175, 179 n. 16 (D.C. Cir. 1969); *United States* v. *Carrols Development Corp.*, 454 F. Supp. 1215, 1220-21 (N.D.N.Y. 1978); *United States* v. *Paramount Pictures, Inc.*, 333 F. Supp. 1100, 1102 (S.D.N.Y.), *aff'd*, 404 U.S. 802 (1971); *United States* v. *Automobile Manufacturers Ass'n*, 307 F. Supp. 617, 619 (C.D. Cal. 1969), *aff'd*, 397 U.S. 248 (1970); *United States* v. *Blue Chip Stamp Co.*, 272 F. Supp. 432 (C.D. Cal. 1967), *aff'd*, 389 U.S. 580 (1968).

the proposition that the Congress intended "may" to mean "shall." In the congressional reports and hearings, it was repeatedly emphasized that the court conducting a Tunney Act proceeding would have the widest possible latitude in choosing the appropriate method for collecting the information necessary to make its decision and that the various means specified in the subsection were to be regarded as permissive.[363]

The applicants for intervention have already been accorded substantial rights in these proceedings — rights which for all intents and purposes have been equal to those possessed with respect to the public interest proceeding by the parties to these lawsuits. In addition to their voluminous comments, they have been permitted to file briefs and reply briefs and through lead counsel they have participated in oral argument. The Court has considered their several procedural and substantive arguments, requests, and recommendations, and a fair number of them have resulted in favorable action. The question now is what participation, if any, should be permitted with respect to future proceedings.

As the substantive portions of this opinion show, the Court has concluded that none of the issues before it requires an evidentiary hearing. That being so, there is obviously no need, nor indeed any occasion, for the presentation by a third party of its own witnesses or for the cross-examination of adverse witnesses. As for the filing of motions or counterclaims, the Court has not been advised of the substance of such pleadings or of the claims or issues to which they might be addressed. More importantly, there will be no occasion for the filing of motions and counterclaims prior to the entry of the judgment for, if the government and AT&T agree to the modifications required by the Court, no further proceedings will be held prior to the entry of judgment.[364]

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[363] See, *e.g.*, S. Rep. No. 93-298, *supra*, at 6 (broad discretion); *Senate Hearings*, *supra*, note 72 at 453 (procedural devices are discretionary in nature) (Sen. Tunney); *Id.* at 149, 152 (necessary information to be adduced through simplest and least time-consuming means) (Judge J. Skelly Wright).

[364] Intervenor status would not be appropraite simply in the abstract.

The situation is different, however, regarding post-judgment proceedings.[365] The Court intends to conduct proceedings prior to its approval of AT&T's plan of reorganization that will be procedurally similar to the proceedings which the Tunney Act requires in advance of the entry of judgment.[366] The Court expects that interested persons and organizations will be given an opportunity to file comments or briefs; there may be oral argument; and, should it appear that factual development would be helpful, there may be evidentiary hearings at which appropriate third parties will be permitted to participate with full rights. These purposes can best be achieved by granting intervenor status to all those who have filed requests or motions to intervene.

At the time the decree is entered, the Court will issue an order describing the rights of intervenors.[367] These will include: (1) the right to appeal the entry of the decree; (2) full participation in the proceedings which the Court will conduct to determine whether to approve the plan of reorganization; and (3) the right to appeal from the Court's decision concerning the plan of reorganization. Intervenor status will terminate thereafter.

Several third parties have requested the grant of authority, either by way of intervenor status or otherwise, to enforce the judgment after the plan of reorganization has been submitted and approved. These requests pose a difficult problem. On the one hand, it is entirely appropriate, for the reasons discussed above, that the judgment continue to be

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As indicted *supra*, the Tunney Act does not require the full formalities extant in normal litigation unless they are needed for the development of information useful to the public interest determination.

[365] In order to permit interested persons to challenge the Court's public interest determination, they will be allowed to intervene for the purpose of appealing the entry of the decree.

[366] Substantively, the proceeding will be limited to an examination of plan's consistency with the judgment. See Subpart A *supra*.

[367] There is no doubt that the Court may authorize intervention on a limited basis. The Tunney Act itself allows the Court to provide for "full or limited participation." 15 U.S.C. § 16(f)(3).

enforced, if necessary by the Court, past the time when the plan of reorganization is approved. The actual divestiture will not occur for eighteen months after formal approval of the plan. Moreover, even after the divestiture significant actions will need to be taken in implementation of the judgment.[368] On the other hand, means must be found for avoiding constant, unnecessary interference by AT&T's competitors and others with implementation of the reorganization and with the normal operations of AT&T and the divested Operating Companies. Furthermore, once the judgment has been entered and the plan of reorganization has been approved, this Court should not be burdened with innumerable requests for clarification, modification, and charges of violation.[369]

To strike an appropriate balance, the Court has decided upon a procedure for the participation of third parties after approval of the reorganization plan which combines the process adopted in *United States* v. *Associated Milk Producers, Inc.*, 394 F. Supp. 29, 46 (W.D. Mo. 1975), *aff'd*, 534 F.2d 113 (8th Cir. 1976) with the government's "bad faith" proposal made in a different context. See note 357 *supra*.

In the *Milk Producers* case, the court, after a finding that a proposed decree was in the public interest, issued an order providing that any interested person who believed that "defendant is not complying with the terms of the Final Judgment," would be authorized to serve upon the Department of Justice a request for enforcement. If the Department refused to bring an enforcement action in response to the request, both that request and the Department's response were to be submitted to the court for a determination of "what, if any, further appropriate proceedings should be directed." This procedure appears to have worked well.[370]

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[368] See note 353 *supra*.

[369] In view of the large number and the variety of interested parties, that contingency is very real.

[370] See *United States* v. *Associated Milk Producers, Inc.*, 477 F. Supp. 671 (W.D. Mo. 1979).

In the exercise of its authority under the Tunney Act, its general equitable powers, and pursuant to Rule 24, Fed. R. Civ. P., the Court will, after the decree has been entered, issue an order which will establish a similar complaint and response procedure, with the proviso, however, that application to the Court may be made only after application for enforcement is first made to the Department of Justice. The application to the Court must be accompanied by an affidavit alleging facts with particularity[371] which, if true, would demonstrate a bad faith refusal by the Department of Justice to enforce the judgment.[372] As in the *Milk Producers* case, the Court will decide upon receipt of such documents what, if any, further proceedings should be initiated.

D. Participation of the Bell Operating Companies

Many persons and organizations have questioned the lack of independent representation for the Operating Companies in this proceeding, both prior to the entry of judgment and in conjunction with the preparation of the plan of reorganization. They contend that AT&T's interests under the proposed settlement are diametrically opposed to those of the Operating Companies, and that AT&T therefore cannot be relied upon to act in the Operating Companies' best interests. They suggest that, for these reasons, the Court should ensure the proper representation of the Operating Companies either by divesting them immediately or by appointing a guardian *ad litem* or similar officer to represent their interests. Such participation will not be ordered at this stage of the proceedings, both because it is not necessary, and, more fundamentally, because there is no practical means for effecting it.

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[371] Cf. Rule 9(b), Fed. R. Civ. P.

[372] Some third parties might, of course, independently have standing to enforce the decree apart from this specific procedure for their participation. See *Natural Resources Defence Council* v. *Costle*, 561 F.2d 904 (D.C. Cir. 1977); Sullivan, *Enforcement of Government Antitrust Decrees by Private Parties: Third Party Beneficiary Rights and Intervenor Status*, 123 U. Pa. L. Rev. 822 (1975); Berger and Bernstein, *An Analytical Framework for Antitrust Standing*, 86 Yale L. J. 809 (1977).

First. It is not at all clear that AT&T will act contrary to the interests of the Operating Companies. Under the proposed decree, AT&T's shareholders will become the shareholders of the Operating Companies and, should AT&T act to undermine the interests of these Companies or fail appropriately to protect them, it and its managers might be liable civilly for breach of their fiduciary duty to these shareholders. See Part IX *supra*. Moreover, since the divested Operating Companies will supply AT&T's sole avenue of access to telephone subscribers and will potentially be large purchasers of Western Electric equipment, AT&T has additional incentives to protect their interests.

Second. The views which the Operating Companies might be expected to espouse have substantially been presented in this proceeding. With respect to all of the issues which presumably would concern the Operating Companies — principally the distribution of the assets and the corporate debt, the restrictions on Operating Company operations, the Operating Company access requirements — able parties with able counsel have presented to the Court the factual, legal, and policy arguments bearing upon these questions. In the main, the Operating Companies would have no particular expertise that would give special value to their participation: the Court's decision generally rests upon the rationale of improved competition, and the relevant information on that subject is available to those who are now before the Court. That is not to say, certainly, that the Operating Companies, if they had independent representation, would not make a contribution; obviously they could and would. But in the opinion of the Court that contribution is not so critical as to outweigh the adverse factors recited below.

Third. There is no existing procedural mechanism which would lend itself to the expression of the veiws of the Operating Companies. Two alternatives have been advanced: an immediate spin-off of the Operating Companies so as to enable them to bargain with AT&T and the Justice Department concerning the terms of the proposed decree, and the appointment of a guardian or trustee to represent their interests in this and future proceedings.

An immediate spin-off of the Operating Companies, while superficially appealing, would be entirely impractical and, notwithstanding the Court's urging, none of those who has advocated such a spin-off has presented a plan that is even remotely feasible. In fact, such an action would leave entirely unresolved all of the problems of administrative coordination, interconnection, and continuity of service that are addressed in the proposed decree.

For example, as a consequence of such a spin-off, the Operating Companies would be wholly independent of AT&T, providing to AT&T neither services nor assistance. At a minimum, this would leave AT&T at a serious disadvantage relative to competitors who have constructed their own complete networks among major cities;[373] at worst, this course would disrupt, for months or perhaps years, the nation's telecommunications network, with incalculable consequences to trade and defense, as well as to ordinary communication and interaction among citizens. At the same time, such a spin-off would leave local and interexchange facilities integrated under the common ownership of the Operating Companies, and it would thus be directly contrary to the antitrust objectives of these lawsuits. The Court will not attempt to catalogue all of the other problems and difficulties that would inevitably accompany a separation without advance planning or agreement similar to that embodied in the proposed decree; but there can be no question but that, in a separation of this magnitude, they would be manifold and in all likelihood insurmountable.[374] As indicated, beyond expressing the general expectation that all those matters may somehow be

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[373] The Operating Companies own most of the facilities necessary for the provision of interexchange service. See Exhibit D-24B-1011. The functioning of AT&T's Long Lines Department would be substantially impaired if the Operating Companies were divested intact.

[374] Much of the impetus for an immediate spin-off results from the belief that there should be arm's length bargaining regarding the valuation of the assets being divided between AT&T and the Operating Companies. That argument in favor of an immediate spin-off is meritless, however, because the Court has concluded that net book value rather than market value is the appropriate standard for this division. See Part IX *supra*.

worked out, not one person or organization has even attempted to suggest practical solutions. For all these reasons, then, the Court has concluded that it will not require an immediate spin-off.

While the Court's power to appoint a guardian, trustee, or similar officer to represent the interests of the Operating Companies is far from clear, its rejection, again, must be bottomed primarily upon the practical difficulties inherent in this approach. If a guardian were appointed at this time, even before the plan of reorganization has been formulated, he could be expected to face considerable difficulty in obtaining the type of detailed information from the Operating Companies which would be the *raison d'etre* of his participation. The personnel of the Operating Companies and the information they possess would remain under the control of AT&T and it is unlikely that a guardian could secure sufficient assistance from them at this stage to warrant the disruption his appointment would entail. Development of an independent expertise by the guardian would be likely to take years, further delaying resolution of this litigation without the promise of any real benefits to the decision-making process.

Participation by the Operating Companies, through their own chief executive officers, will be appropriate, however, with respect to the process of implementation of the decree. At the time the plan of reorganization is presented, the seven new regional Operating Companies and their chief executives will be a long way on the road toward independence, with a substantial incentive to represent and advocate their own interests. Moreover, their familiarity with the facilities required to provide local and intercity service and exchange access would give them special expertise concerning the adequacy of the reorganization plan in regard to the division of assets.

The Court accordingly intends to require that, at the time the plan of reorganization is submitted to the Court by the Department of Justice, the designated chief executive officers of the seven regional Operating Companies file with the Court sworn statements certifying that, to the best of their knowl-

edge, the plan will leave the companies which they head as viable entities with the resources necessary to perform the functions described in the decree. These statements will also be expected to discuss any element of the plan of reorganization that may have been imposed by AT&T over the objections of any chief executive officer.[375] The Court expects, additionally, to call upon the chief executive officers or their staffs to participate in other respects as well in the proceedings held at the time the plan of reorganization is presented for judicial approval.

XII
CONCLUSION

The proposed reorganization of the Bell System raises issues of vast complexity. Because of their importance, not only to the parties but also to the telecommunications industry and to the public, the Court has discussed the various problems in substantial detail. It is appropriate to summarize briefly the major issues and the Court's decisions which are central to the proceeding.

A. The American telecommunications industry is presently dominated by one company — AT&T. It provides local and long-distance telephone service; it manufactures and markets the equipment used by telephone subscribers as well as that used in the telecommunications network; and it controls one of the leading communications research and development facilities in the world. According to credible evidence, this integrated structure has enabled AT&T for many years to undermine the efforts of competitors seeking to enter the telecommunications market.

The key to the Bell System's power to impede competition has been its control of local telephone service. The local

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[375] In order to enable the Court to assess the weight to be accorded to the statements of these individuals, they will also be invited, but not required, to reveal any continuing relationship they may have with AT&T (i.e., reemployment rights, pension plans, informal promises of executive position with AT&T).

telephone network functions as the gateway to individual telephone subscribers. It must be used by long-distance carriers seeking to connect one caller to another. Customers will only purchase equipment which can readily be connected to the local network through the telephone outlets in their homes and offices. The enormous cost of the wires, cables, switches, and other transmission facilities which comprise that network has completely insulated it from competition. Thus, access to AT&T's local network is crucial if long distance carriers and equipment manufacturers are to be viable competitors.

AT&T has allegedly used its control of this local monopoly to disadvantage these competitors in two principal ways. First, it has attempted to prevent competing long distance carriers and competing equipment manufacturers from gaining access to the local network, or to delay that access, thus placing them in an inferior position vis-a-vis AT&T's own services. Second, it has supposedly used profits earned from the monopoly local telephone operations to subsidize its long distance and equipment businesses in which it was competing with others.

For a great many years, the Federal Communications Commission has struggled, largely without success, to stop practices of this type through the regulatory tools at its command. A lawsuit the Department of Justice brought in 1949 to curb similar practices ended in an ineffectual consent decree. Some other remedy is plainly required; hence the diversiture of the local Operating Companies from the Bell System. This divestiture will sever the relationship between this local monopoly and the other, competitive segments of AT&T, and it will thus ensure — certainly better than could any other type of relief — that the practices which allegedly have lain heavy on the telecommunications industry will not recur.

B. With the loss of control over the local network, AT&T will be unable to disadvantage its competitors, and the restrictions imposed on AT&T after the government's first antitrust suit — which limited AT&T to the provision of

telecommunications services — will no longer be necessary. The proposed decree accordingly removes these restrictions.

The decree will thus allow AT&T to become a vigorous competitor in the growing computer, computer-related, and information markets. Other large and experienced firms are presently operating in these markets, and there is therefore no reason to believe that AT&T will be able to achieve monopoly dominance in these industries as it did in telecommunications. At the same time, by use of its formidable scientific, engineering, and management resources, including particularly the capabilities of Bell Laboratories, AT&T should be able to make significant contributions to these fields, which are at the forefront of innovation and technology, to the benefit of American consumers, national defense, and the position of American industry vis-a-vis foreign competition.

All of these developments are plainly in the public interest, and the Court will therefore approve this aspect of the proposed decree, with one exception. Electronic publishing, which is still in its infancy, holds promise to become an important provider of information — such as news, entertainment, and advertising — in competition with the traditional print, television, and radio media; indeed, it has the potential, in time, for actually replacing some of these methods of disseminating information.

Traditionally, the Bell System has simply distributed information provided by others; it has not been involved in the business of generating its own information. The proposed decree would, for the first time, allow AT&T to do both, and it would do so at a time when the electronic publishing industry is still in a fragile state of experimentation and growth and when electronic information can still most efficiently and most economically be distributed over AT&T's long distance network. If, under these circumstances, AT&T were permitted to engage both in the transmission and the generation of information, there would be a substantial risk not only that it would stifle the efforts of other electronic publishers but that it would acquire a substantial monopoly over the generation of news in the more general sense. Such

a development would strike at a principle which lies at the heart of the First Amendment: that the American people are entitled to a diversity of sources of information. In order to prevent this from occurring, the Court will require, as a condition of its approval of the proposed decree, that it be modified to preclude AT&T from entering the field of electronic publishing until the risk of its domination of that field had abated.

C. After the divestiture, the Operating Companies will possess a monopoly over local telephone service. According to the Department of Justice, the Operating Companies must be barred from entering all competitive markets to ensure that they will not misuse their monopoly power. The Court will not impose restrictions simply for the sake of theoretical consistency. Restrictions must be based on an assessment of the realistic circumstances of the relevant markets, including the Operating Companies' ability to engage in anticompetitive behavior, their potential contribution to the market as an added competitor for AT&T, as well as upon the effects of the restrictions on the rates for local telephone service.

This standard requires that the Operating Companies be prohibited from providing long distance services and information services, and from manufacturing equipment used in the telecommunications industry. Participation in these fields carries with it a substantial risk that the Operating Companies will use the same anticompetitive techniques used by AT&T in order to thwart the growth of their own competitors. Moreover, contrary to the assumptions made by some, Operating Company involvement in these areas could not legitimately generate subsidies for local rates. Such involvement could produce substantial profits only if the local companies used their monopoly position to dislodge competitors or to provide subsidy for their competitive services or products — the very behavior the decree seeks to prevent.

Different considerations apply, however, to the marketing of customer premises equipment — the telephone and other devices used in subscribers' homes and offices — and the production of the Yellow Pages advertising directories. For

a variety of reasons, there is little likelihood that these companies will be able to use their monopoly position to disadvantage competitors in these areas. In addition, their marketing of equipment will provide needed competition for AT&T, and the elimination of the restriction on their production of the Yellow Pages will generate a substantial subsidy for local telephone rates.[376] The Court will therefore require that the proposed decree be modified to remove the restrictions on these two types of activities.

D. With respect to a number of subjects, the proposed decree establishes merely general principles and objectives, leaving the specific implementing details for subsequent action, principally by the plan of reorganization which AT&T is required to file within six months after entry of the judgment. The parties have also made informal promises, either to each other or to the Court, as to how they intend to interpret or implement various provisions. The Court has decided that its public interest responsibilities require that it establish a process for determining whether the plan of reorganization and other, subsequent actions by AT&T actually implement these principles and promises in keeping with the objectives of the judgment. Absent such a process, AT&T would have the opportunity to interpret and implement the broad principles of the decree in such a manner as to disadvantage it competitors, the Operating Companies, or both, or otherwise to act in a manner contrary to the public interest as interpreted by the Court in this opinion.

For that reason, the Court is requiring that the judgment be modified (1) to vest authority in the Court to enforce the provisions and principles of that judgment on its own rather than only at the request of a party; and (2) to provide for a

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[376] The decree also provides for another method of subsidizing these rates. It permits the Operating Companies, under the supervision of state and federal regulators, to levy access charges upon long distance carriers and those companies that provide information services. These charges may, if the regulators desire, be set at levels which continue the present level of subsidy for local telephone rates.

proceeding, accessible to third party intervenors and to the chief executives of the seven new regional Operating Companies, in which the Court will determine whether the plan of reorganization is consistent with the decree's general principles and promises.

E. For the reasons stated in this opinion, the Court will approve the proposed decree as in the public interest provided that the parties agree to the addition of the following new section:

VIII

MODIFICATIONS

A. Notwithstanding the provisions of section II(D)(2), the separated BOCs shall be permitted to provide, but not manufacture, customer premises equipment.

B. Notwithstanding the provisions of section II(D)(3), the separated BOCs shall be permitted to produce, publish, and distribute printed directories which contain advertisements and which list general product and business categories, the service or product providers under these categories, and their names, telephone numbers, and addresses.

Notwithstanding the provisions of sections I(A)(1), I(A)(2), I(A)(4), all facilities, personnel, systems, and rights to technical information owned by AT&T, its affiliates, or the BOCs which are necessary for the production, publication, and distribution of printed advertising directories shall be transferred to the separated BOCs.

C. The restrictions imposed upon the separated BOCs by virtue of section II(D) shall be removed upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter.

D. AT&T shall not engage in electronic publishing over its own transmission facilities. "Electronic publishing" means the provision of any information which AT&T or its affiliates has, or has caused to be, originated, authored, compiled, collected, or edited, or in which it

has a direct or indirect financial or proprietary interest, and which is disseminated to an unaffiliated person through some electronic means.

Nothing in this provision precludes AT&T from offering electronic directory services that list general product and business categories, the service or product providers under these categories, and their names, telephone numbers, and addresses; or from providing the time, weather, and such other audio services as are being offered as of the date of the entry of the decree to the geographic areas of the country receiving those services as of that date.

Upon application of AT&T, this restriction shall be removed after seven years from the date of entry of the decree, unless the Court finds that competitive conditions clearly require its extension.

E. If a separated BOC provides billing services to AT&T pursuant to Appendix B(C)(2), it shall include upon the portion of the bill devoted to interexchange services the following legend:

> This portion of your bill is provided as a service to AT&T. There is no connection between this company and AT&T. You may choose another company for your long distance telephone calls while still receiving your local telephone service from this company.

F. Notwithstanding the provisions of Appendix B(C)(3), whenever, as permitted by the decree, a separated BOC fails to offer exchange access to an interexchange carrier that is equal in type and quality to that provided for the interexchange traffic of AT&T, the tariffs filed for such less-than-equal access shall reflect the lesser cost, if any, of such access as compared to the exchange access provided AT&T.

G. Facilities and other assets which serve both AT&T and one or more BOCs shall be transferred to the separated BOCs if the use made by such BOC or BOCs predominates over that of AT&T. Upon application by a party or a BOC, the Court may grant an exception to this requirement.

H. At the time of the transfer of ownership provided for in section I(A)(4), the separated BOCs shall have

debt ratios of approximately forty-five percent (except for Pacific Telephone and Telegraph Company which shall have a debt ratio of approximately fifty percent), and the quality of the debt shall be representative of the average terms and conditions of the consolidated debt held by AT&T, its affiliates and the BOCs at that time. Upon application by a party or a BOC, the Court may grant an exception to this requirement.

I. The Court may not act *sua sponte* to issue orders or directions for the construction or carrying out of this decree, for the enforcement of compliance therewith, and for the punishment of any violation thereof.

J. Notwithstanding the provisions of section I(A), the plan of reorganization shall not be implemented until approved by the Court as being consistent with the provisions and principles of the decree.

F. The United States and AT&T shall within fifteen days hereof submit to the Court their proposed decree, including the modifications listed above, or their statements that they are not prepared to incorporate such modifications. If a modified decree is submitted, the Court will promptly approve it as being in the public interest, and the *AT&T* action will be dismissed. If the parties do not agree to incorporate the modifications, the Court will decline to approve the proposed decree, the 1956 consent decree in the *Western Electric* action will remain in effect, and the *AT&T* trial will resume at a date to be set by the Court.

_____

Harold H. Greene
United States District Judge

Dated: August 11, 1982.

S/_____

MODIFICATION OF FINAL JUDGMENT

(Entered August 24, 1982)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. WESTERN ELECTRIC COMPANY, INCORPORATED, AND AMERICAN TELEPHONE AND TELEGRAPH COMPANY, Defendants.	Civil Action No. 82-0192

MODIFICATION OF FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on January 14, 1949; the defendants having appeared and filed their answer to such complaint denying the substantive allegations thereof; the parties, by their attorneys, having severally consented to a Final Judgment which was entered by the Court on January 24, 1956, and the parties having subsequently agreed that modification of such Final Judgment is required by the technological, economic and regulatory changes which have occurred since the entry of such Final Judgment;

Upon joint motion of the parties and after hearing by the Court, it is hereby

ORDERED, ADJUDGED, AND DECREED that the Final Judgment entered on January 24, 1956, is hereby vacated in its entirety and replaced by the following items and provisions:

I
AT&T Reorganization

A. Not later than six months after the effective date of this Modification of Final Judgment, defendant AT&T shall submit to the Department of Justice for its approval, and thereafter implement, a plan of reorganization. Such plan shall provide for the completion, within 18 months after the effective date of this Modification of Final Judgment, of the following steps:

1. The transfer from AT&T and its affiliates to the BOCs, or to a new entity subsequently to be separated from AT&T and to be owned by the BOCs, of sufficient facilities, personnel, systems, and rights to technical information to permit the BOCs to perform, independently of AT&T, exchange telecommunications and exchange access functions, including the procurement for, and engineering, marketing and management of, those functions, and sufficient to enable the BOCs to meet the equal exchange access requirements of Appendix B;

2. The separation within the BOCs of all facilities, personnel and books of account between those relating to the exchange telecommunications or exchange access functions and those relating to other functions (including the provision of interexchange switching and transmission and the provision of customer premises equipment to the public); provided that there shall be no joint ownership of facilities, but appropriate provision may be made for sharing, through leasing or otherwise, of multifunction facilities so long as the separated portion of each BOC is ensured control over the exchange telecommunications and exchange access functions;

3. The termination of the License Contracts between AT&T and the BOCs and other subsidiaries and the Standard Supply Contract between Western Electric and the BOCs and other subsidiaries; and

4. The transfer of ownership of the separated portions of the BOCs providing local exchange and exchange access services from AT&T by means of a spin-off of stock of the separated BOCs to the shareholders of AT&T, or by other

disposition; provided that nothing in this Modification of Final Judgment shall require or prohibit the consolidation of the ownership of the BOCs into any particular number of entities.

B. Notwithstanding separation of ownership, the BOCs may support and share the costs of a centralized organization for the provision of engineering, administrative and other services which can most efficiently be provided on a centralized basis. The BOCs shall provide, through a centralized organization, a single point of contact for coordination of BOCs to meet the requirements of national security and emergency preparedness.

C. Until September 1, 1987, AT&T, Western Electric, and the Bell Telephone Laboratories, shall, upon order of any BOC, provide on a priority basis all research, development, manufacturing, and other support services to enable the BOCs to fulfill the requirements of this Modification of Final Judgment. AT&T and its affiliates shall take no action that interferes with the BOCs' requirements of nondiscrimination established by section II.

D. After the reorganization specified in paragraph I(A)(4), AT&T shall not acquire the stock or assets of any BOC.

II
BOC Requirements

A. Subject to Appendix B, each BOC shall provide to all interexchange carriers and information service providers exchange access, information access, and exchange services for such access on an unbundled, tariffed basis, that is equal in type, quality, and price to that provided to AT&T and its affiliates.

B. No BOC shall discriminate between AT&T and its affiliates and their products and services and other persons and their products and services in the:

1. procurement of products and services;

2. establishment and dissemination of technical information and procurement and interconnection standards;

3. interconnection and use of the BOC's telecommunications service and facilities or in the charges for each element of service; and

4. provision of new services and the planning for and implementation of the construction or modification of facilities, used to provide exchange access and information access.

C. Within six months after the reorganization specified in paragraph I(A)(4), each BOC shall submit to the Department of Justice procedures for ensuring compliance with the requirements of paragraph B.

D. After completion of the reorganization specified in section I, no BOC shall, directly or through any affiliated enterprise:

1. provide interexchange telecommunications services or information services;

2. manufacture or provide telecommunications products or customer premises equipment (except for provision of customer premises equipment for emergency services); or

3. provide any other product or service, except exchange telecommunications and exchange access service, that is not a natural monopoly service actually regulated by tariff.

III

Applicability and Effect

The provisions of this Modification of Final Judgment, applicable to each defendant and each BOC, shall be binding upon said defendants and BOCs, their affiliates, successors and assigns, officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with each defendant and BOC who receive actual notice of this Modification of Final Judgment by personal service or otherwise. Each defendant and each person bound by the prior sentence shall cooperate in ensuring that the provisions of this Modification of Final Judgment are carried out. Neither this Modification of Final Judgment nor any of its terms or provisions shall constitute any evidence against, an admission

by, or an estoppel against any party or BOC. The effective date of this Modification of Final Judgment shall be the date upon which it is entered.

IV
DEFINITIONS

For the purposes of this Modification of Final Judgment:

A. "Affiliate" means any organization or entity, including defendant Western Electric Company, Incorporated, and Bell Telephone Laboratories, Incorporated, that is under direct or indirect common ownership with or control by AT&T or is owned or controlled by another affiliate. For the purposes of this paragraph, the terms "ownership" and "owned" mean a direct or indirect equity interest (or the equivalent thereof) of more than fifty (50) percent of an entity. "Subsidiary" means any organization or entity in which AT&T has stock ownership, whether or not controlled by AT&T.

B. "AT&T" shall mean defendant American Telephone and Telegraph Company and its affiliates.

C. "Bell Operating Companies" and "BOCs" mean the corporations listed in Appendix A attached to this Modification of Final Judgment and any entity directly or indirectly owned or controlled by a BOC or affiliated through substantial common ownership.

D. "Carrier" means any person deemed a carrier under the Communications Act of 1934 or amendments thereto, or, with respect to intrastate telecommunications, under the laws of any State.

E. "Customer premises equipment" means equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications, but does not include equipment used to multiplex, maintain, or terminate access lines.

F. "Exchange access" means the provision of exchange services for the purpose of originating or terminating interexchange telecommunications. Exchange access services in-

clude any activity or function performed by a BOC in connection with the origination or termination of interexchange telecommunications, including but not limited to, the provision of network control signalling, answer supervision, automatic calling number identification, carrier access codes, directory services, testing and maintenance of facilities and the provision of information necessary to bill customers. Such services shall be provided by facilities in an exchange area for the transmission, switching, or routing, within the exchange area, of interexchange traffic originating or terminating within the exchange area, and shall include switching traffic within the exchange area above the end office and delivery and receipt of such traffic at a point or points within an exchange area designated by an interexchange carrier for the connection of its facilities with those of the BOC. Such connections, at the option of the interexchange carrier, shall deliver traffic with signal quality and characteristics equal to that provided similar traffic of AT&T, including equal probability of blocking, based on reasonable traffic estimates supplied by each interexchange carrier. Exchange services for exchange access shall not include the performance by any BOC of interexchange traffic routing for any interexchange carrier. In the reorganization specified in section I, trunks used to transmit AT&T's traffic between end offices and class 4 switches shall be exchange access facilities to be owned by the BOCs.

G. "Exchange area," or "exchange" means a geographic area established by a BOC in accordance with the following criteria:

1. any such area shall encompass one or more contiguous local exchange areas serving common social, economic, and other purposes, even where such configuration transcends municipal or other local governmental boundaries;

2. every point served by a BOC within a State shall be included within an exchange area;

3. no such area which includes part or all of one standard metropolitan statistical area (or a consolidated statistical area, in the case of densely populated States) shall include a substantial part of any other standard metropolitan statistical area (or a consolidated statistical area, in the

case of densely populated States), unless the Court shall otherwise allow; and

4. except with approval of the Court, no exchange area located in one State shall include any point located within another State.

H. "Information" means knowledge or intelligence represented by any form of writing, signs, signals, pictures, sounds, or other symbols.

I. "Information access" means the provision of specialized exchange telecommunications services by a BOC in an exchange area in connection with the origination, termination, transmission, switching, forwarding or routing of telecommunications traffic to or from the facilities of a provider of information services. Such specialized exchange telecommunications services include, where necessary, the provision of network control signalling, answer supervision, automatic calling number identification, carrier access codes, testing and maintenance of facilities, and the provision of information necessary to bill customers.

J. "Information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications, except that such service does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

K. "Interexchange telecommunications" means telecommunications between a point or points located in one exchange telecommunications area and a point or points located in one or more other exchange areas or a point outside an exchange area.

L. "Technical information" means intellectual property of all types, including, without limitation, patents, copyrights, and trade secrets, relating to planning documents, designs, specifications, standards, and practices and procedures, including employee training.

N. "Telecommunications equipment" means equipment, other

than customer premises equipment, used by a carrier to provide telecommunications services.

O. "Telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received, by means of electromagnetic transmission, with or without benefit of any closed transmission medium, including all instrumentalities, facilities, apparatus, and services (including the collection, storage, forwarding, switching, and delivery of such information) essential to such transmission.

P. "Telecommunications service" means the offering for hire of telecommunications facilities, or of telecommunications by means of such facilities.

Q. "Transmission facilities" means equipment (including without limitation wire, cable, microwave, satellite, and fibre-optics) that transmit information by electromagnetic means or which directly support such transmission, but does not include customer premises equipment.

V

Compliance Provisions

The defendants, each BOC, and affiliated entities are ordered and directed to advise their officers and other management personnel with significant responsibility for matters addressed in this Modification of Final Judgment of their obligations hereunder. Each BOC shall undertake the following with respect to each such officer or management employee:

1. The distribution to them of a written directive setting forth their employer's policy regardng compliance with the Sherman Act and with this Modification of Final Judgment, with such directive to include:

(a) an admonition that non-compliance with such policy and this Modification of Final Judgment will result in appropriate disciplinary action determined by their employer and which may include dismissal; and

(b) advice that the BOCs' legal advisors are available

at all reasonable times to confer with such persons regarding any compliance questions or problems;

2. The imposition of a requirement that each of them sign and submit to their employer a certificate in substantially the following form:

> The undersigned hereby (1) acknowledges receipt of a copy of the 1982 *United States* v. *Western Electric* Modification of Final Judgment and a written directive setting forth Company policy regarding compliance with the antitrust laws and with such Modification of Final Judgment, (2) represents that the undersigned has read such Modification of Final Judgment and directive and understands those provisions for which the undersigned has responsibility, (3) acknowledges that the undersigned has been advised and understands that non-compliance with such policy and Modification of Final Judgment will result in appropriate disciplinary measures determined by the Company and which may include dismissal, and (4) acknowledges that the undersigned has been advised and understands that non-compliance with the Modification of Final Judgment may also result in conviction for contempt of court and imprisonment and/or fine.

VI

Visitorial Provisions

A. For the purpose of determining or securing compliance with this Modification of Final Judgment, and subject to any legally recognized privilege, from time to time:

1. Upon written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to a defendant or after the reorganization specified in section I, a BOC, made to its principal office, duly authorized representatives of the Department of Justice shall be permitted access during office hours of such defendants or BOCs to depose or interview officers, employees, or agents, and inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession

or under the control of such defendant, BOC, or subsidiary companies, who may have counsel present, relating to any matters contained in this Modification of Final Judgment; and

2. Upon the written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division made to a defendant's principal office or, after the reorganization specified in section I, a BOC, such defendant, or BOC, shall submit such written reports, under oath if requested, with respect to any of the matters contained in this Modification of Final Judgment as may be requested.

B. No information or documents obtained by the means provided in this section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the United States or the Federal Communications Commission, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

C. If at the time information or documents are furnished by a defendant to plaintiff, such defendant or BOC represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and said defendant or BOC marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then 10 days' notice shall be given by plaintiff to such defendant or BOC prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which that defendant or BOC is not a party.

VII

Retention of Jurisdiction

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Modification of Final Judgment, or, after the reorganization specified in section I,

a BOC to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Modification of Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violation hereof.

VIII

MODIFICATIONS

A. Notwithstanding the provisions of section II(D)(2), the separated BOCs shall be permitted to provide, but not manufacture, customer premises equipment.

B. Notwithstanding the provisions of section II(D)(3), the separated BOCs shall be permitted to produce, publish, and distribute printed directories which contain advertisements and which list general product and business categories, the service or product providers under these categories, and their names, telephone numbers, and addresses.

Notwithstanding the provisions of sections I(A)(1), I(A)(2), I(A)(4), all facilities, personnel, systems, and rights to technical information owned by AT&T, its affiliates, or the BOCs which are necessary for the production, publication, and distribution of printed advertising directories shall be transferred to the separated BOCs.

C. The restrictions imposed upon the separated BOCs by virtue of section II(D) shall be removed upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter.

D. AT&T shall not engage in electronic publishing over its own transmission facilities. "Electronic publishing" means the provision of any information which AT&T or its affiliates has, or has caused to be, originated, authored, compiled, collected, or edited, or in which it has a direct or indirect financial or proprietary interest, and which is disseminated to an unaffiliated person through some electronic means.

Nothing in this provision precludes AT&T from offering

electronic directory services that list general product and business categories, the service or product providers under these categories, and their names, telephone numbers, and addresses; or from providing the time, weather, and such other audio services as are being offered as of the date of the entry of the decree to the geographic areas of the country receiving those services as of that date.

Upon application of AT&T, this restriction shall be removed after seven years from the date of entry of the decree, unless the Court finds that competitive conditions clearly require its extension.

E. If a separated BOC provides billing services to AT&T pursuant to Appendix B(C)(2), it shall include upon the portion of the bill devoted to interexchange services the following legend:

> This portion of your bill is provided as a service to AT&T. There is no connection between this company and AT&T. You may choose another company for your long distance telephone calls while still receiving your local telephone service from this company.

F. Notwithstanding the provisions of Appendix B(C)(3), whenever, as permitted by the decree, a separated BOC fails to offer exchange access to an interexchange carrier that is equal in type and quality to that provided for the interexchange traffic of AT&T, the tariffs filed for such less-than-equal access shall reflect the lesser cost, if any, of such access as compared to the exchange access provided AT&T.

G. Facilities and other assets which serve both AT&T and one or more BOCs shall be transferred to the separated BOCs if the use made by such BOC or BOCs predominates over that of AT&T. Upon application by a party or a BOC, the Court may grant an exception to this requirement.

H. At the time of the transfer of ownership provided for in section I(A)(4), the separated BOCs shall have debt ratios of approximately forty-five percent (except for Pacific Telephone and Telegraph Company which shall have a debt ratio of approximately fifty percent), and the quality of the debt

shall be representative of the average terms and conditions of the consolidated debt held by AT&T, its affiliates and the BOCs at that time. Upon application by a party or a BOC, the Court may grant an exception to this requirement.

I. The Court may act *sua sponte* to issue orders or directions for the construction or carrying out of this decree, for the enforcement of compliance therewith, and for the punishment of any violation thereof.

J. Notwithstanding the provisions of section I(A), the plan of reorganization shall not be implemented until approved by the Court as being consistent with the provisions and principles of the decree.

Entered this _____ day of _____, 1982.

United States District Judge

S/_____
Harold H. Greene
United States District Judge

APPENDIX A

Bell Telephone Company of Nevada

Illinois Bell Telephone Company

Indiana Bell Telephone Company, Incorporated

Michigan Bell Telephone Company

New England Telephone and Telegraph Company

New Jersey Bell Telephone Company

New York Telephone Company

Northwestern Bell Telephone Company

Pacific Northwest Bell Telephone Company

South Central Bell Telephone Company

Southern Bell Telephone and Telegraph Company

Southwestern Bell Telephone Company

The Bell Telephone Company of Pennsylvania

The Chesapeake and Potomac Telephone Company

The Chesapeake and Potomac Telephone Company of Maryland

The Chesapeake and Potomac Telephone Company of Virginia

The Chesapeake and Potomac Telephone Company of West Virginia

The Diamond State Telephone Company

The Mountain States Telephone and Telegraph Company

The Ohio Bell Telephone Company

The Pacific Telephone and Telegraph Company

Wisconsin Telephone Company

APPENDIX B

PHASED-IN BOC PROVISION OF EQUAL EXCHANGE ACCESS

A. 1. As part of its obligation to provide non-discriminatory access to interexchange carriers, no later than September 1, 1984, each BOC shall begin to offer to all interexchange carriers exchange access on an unbundled, tariffed basis, that is equal in type and quality to that provided for the interexchange telecommunications services of AT&T and its affiliates. No later than September 1, 1985, such equal access shall be offered through end offices of each BOC serving at least one-third of that BOC's exchange access lines and, upon bona fide request, every end office shall offer such access by September 1, 1986. Nothing in this Modification of Final Judgment shall be construed to permit a BOC to refuse to provide to any interexchange carrier or information service provider, upon bona fide request, exchange or information access superior or inferior in type or quality to that provided for AT&T's interexchange services or information services at charges reflecting the reduced or increased cost of such access.

2. (i) Notwithstanding paragraph (1), in those instances in which a BOC is providing exchange access for Message Telecommunications Service on the effective date of this Modification of Final Judgment through access codes that do not permit the designation of more than one interexchange carrier, then, in accordance with the schedule set out in paragraph (1), exchange access for additional carriers shall be provided through access codes containing the minimum number of digits necessary at the time access is sought to permit nationwide, multiple carrier designation for the number of interexchange carriers reasonably expected to require such designation in the immediate future.

(ii) Each BOC shall, in accordance with the schedules set out in paragraph (1), offer as a tariffed service exchange access that permits each subscriber automatically to route, with the use of access codes, all the subscriber's interexchange communications to the interexchange carrier of the customer's designation.

(iii) At such time as the national numbering area (area code) plan is revised to require the use of additional digits, each BOC shall provide exchange access to every interexchange carrier, including AT&T, through a uniform number of digits.

3. Notwithstanding paragraphs (1) and (2), with respect to access provided through an end office employing switches technologically antecedent to electronic, stored program control switches or those offices served by switches that characteristically serve fewer than 10,000 access lines, a BOC may not be required to provide equal access through a switch if, upon complaint being made to the Court, the BOC carries the burden of showing that for particular categories of services such access is not physically feasible except at costs that clearly outweigh potential benefits to users of telecommunications services. Any such denial of access under the preceding sentence shall be for the minimum divergence in access necessary, and for the minimum time necessary, to achieve such feasibility.

B. 1. The BOCs are ordered and directed to file, to become effective on the effective date of the reorganization described in paragraph I(A)(4), tariffs for the provision of exchange access including the provision by each BOC of exchange access for AT&T's interexchange telecommunications. Such tariffs shall provide unbundled schedules of charges for exchange access and shall not discriminate against any carrier or other customer. Such tariffs shall replace the division of revenues process used to allocate revenues to a BOC for exchange access provided for the interexchange telecommunications of BOCs or AT&T.

2. Each tariff for exchange access shall be filed on an unbundled basis specifying each type of service, element by element, and no tariff shall require an interexchange carrier to pay for types of exchange access that it does not utilize. The charges for each type of exchange access shall be cost justified and any differences in charges to carriers shall be cost justified on the basis of differences in services provided.

3. Notwithstanding the requirements of paragraph (2), from the date of reorganization specified in section I until

September 1, 1991, the charges for delivery or receipt of traffic of the same type between end offices and facilities of interexchange carriers within an exchange area, or within reasonable subzones of an exchange area, shall be equal, per unit of traffic delivered or received, for all interexchange carriers; provided, that the facilities of any interexchange carrier within five miles of an AT&T class 4 switch shall, with respect to end offices served by such class 4 switch, be considered to be in the same subzone as such class 4 switch.

4. Each BOC offering exchange access as part of a joint or through service shall offer to make exchange access available to all interexchange carriers on the same terms and conditions, and at the same charges, as are provided as part of a joint or through service, and no payment or consideration of any kind shall be retained by the BOC for the provision of exchange access under such joint or through service other than through tariffs filed pursuant to this paragraph.

C. 1. Nothing in this Modification of Final Judgment shall be construed to require a BOC to allow joint ownership or use of its switches, or to require a BOC to allow co-location in its building of the equipment of other carriers. When a BOC uses facilities that (i) are employed to provide exchange telecommunications or exchange access or both, and (ii) are also used for the transmission or switching of interexchange telecommunications, then the costs of such latter use shall be allocated to the interexchange use and shall be excluded from the costs underlying the determination of charges for either of the former uses.

2. Nothing in this Modification of Final Judgment shall either require a BOC to bill customers for the interexchange services of any interexchange carrier or preclude a BOC from billing its customers for the interexchange services of any interexchange carrier it designates, provided that when a BOC does provide billing services to an interexchange carrier, the BOC may not discontinue local exchange service to any customer because of nonpayment of interexchange charges unless it offers to provide billing services to all interexchange carriers, and provided further that the BOC's cost of any

such billing shall be included in its tariffed access charges to that interexchange carrier.

3. Whenever, as permitted by this Modification of Final Judgment, a BOC fails to offer exchange access to an interexchange carrier that is equal in type and quality to that provided for the interexchange traffic of AT&T, nothing in this Modification of Final Judgment shall prohbibit the BOC from collecting reduced charges for such less-than-equal exchange access to reflect the lesser value of such exchange access to the interexchange carrier and its customers compared to the exchange access provided AT&T.

ORDER ADMITTING INTERVENORS

(Entered: August 26, 1982)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. WESTERN ELECTRIC COMPANY, INC., AND AMERICAN TELEPHONE AND TELEGRAPH COMPANY, Defendants.	Civil Action No. 82-0192
UNITED STATES OF AMERICA, Plaintiff, v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al., Defendants.	Misc. No. 82-0025 (PI)

ORDER

Upon consideration of the motions to intervene, the memoranda submitted in support thereof, and the entire record herein, and for the reasons stated in this Court's opinion of August 11, 1982, it is this 26th day of August, 1982,

ORDERED

1. The motions to intervene be and they are hereby granted, and the following persons and organizations are hereby permitted to intervene:

Ad Hoc Telecommunications Users Committee; American Newspaper Publishers Association; American Petroleum Institute; American Satellite Company; Associated Telephone Answering Exchanges, Inc.; Association of American Railroads; Association of Data Communications Users; Association of Data Processing Service Organizations; Audichron Company; Black Citizens for a Fair Media; California Hispanics; Citizens Utilities Company; Communication Commission of the National Council of the Churches of Christ in the USA; Communications Workers of America; Compuserve, Inc.; Computer and Business Equipment Manufacturers Association; Computer and Communications Industry Association; Compuserve, Inc.; Congress Watch; Continental Telecom, Inc.; D/FW Signal, Inc.; Education and Cultivation Division of the General Board of Global Ministries of the United Methodist Church; Federal Communications Commission; General Dynamics Communications Co.; General Telephone & Electronics Corp.; Independent Data Communications Manufacturers Association; Independent Telecommunications Suppliers' Council; International Telephone and Telegraph Corp.; Jack Faucett Associates, Inc., et al.; Leghorn Telepublishing Co.; MCI Communications Corp.; Mobile Marine Radio, Inc.; National Association for the Advancement of Colored People; National Association for Better Broadcasting; National Association of Broadcasters; National Association of Regulatory Utility Commissioners; National Association of State Utility Consumer Advocates; Na-

tional Cable Television Association; National Catholic Broadcasters Association; National Citizens Committee for Broadcasting; National Latino Media Coalition; National Newspaper Association; North American Telephone Association; Northeastern Telephone Co.; Office of Communication of the United Church of Christ; Reformed Church in America; Rogers Radio Communication Services, Inc.; Rural Telephone Coalition; San/Bar Corp.; Satellite Business Systems; Sonitrol Distributers Council, Inc.; Southern Pacific Communications Co.; Sperry Corporation; Stromberg-Carlson Corp.; Tandy Corporation; Telocator Network of America; U.S. Telephone Communications, Inc.; United States Independent Telephone Association; United States Telecommunications Suppliers Association; United Telecommunications, Inc.; Utilities Telecommunications Council; Warner Amex Cable Communications, Inc.; Western Union Telegraph Co.; Westinghouse Broadcasting and Cable, Inc.; States of Arizona, California, Colorado, Delaware, Illinois, Maine, Maryland, Michigan, Missouri, New Mexico, New Hampshire, New York, North Carolina, Oregon, Pennsylvania, Tennessee, Virginia, Wisconsin; Public Service Commissions of Arkansas, California, District of Columbia, Florida, Idaho, Kentucky, Michigan, Missouri, Montana, Nebraska, Nevada, New York, South Dakota, Utah, West Virginia, Wisconsin, Wyoming; Iowa Commerce Commission; Kansas Corporation Commission; New Mexico Corporation Commission; Office of the Consumers' Counsel, State of Ohio; Oklahoma Corporation Commission; Virginia State Corporation Commission; Washington Utilities and Transportation Commission; City of Cincinnati; City of New York.

2. The intervenors shall have the following rights:

a. the right to appeal this Court's decision to enter the consent decree in Civil Action No. 82-0192 and to dismiss Civil Action No. 74-1698; and, if an appeal is taken by another intervenor, the right, to the extent permitted by the reviewing courts, to support this Court's decisions on appeal;

b. the right to participate fully in proceedings to be established by this Court to determine whether the plan of reorganization filed pursuant to the consent decree should be approved; and

c. the right to appeal this Court's decision concerning such plan of reorganization; and, if an appeal is taken, the right, to the extent permitted by the reviewing courts, to support this Court's decision on appeal.

3. Intervenor status shall terminate in this Court with the entry of this Court's decision concerning the plan of reorganization, and, more generally, following appellate review of the Court's decision concerning such plan.

S/_____
Harold H. Greene
United States District Judge

MEMORANDUM DENYING RECONSIDERATION OF CUSTOMER PREMISES EQUIPMENT AMENDMENTS

(Issued August 23, 1982)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INC.; AND BELL TELEPHONE LABORATORIES, INC., Defendants.	Civil Action No. 74-1698
UNITED STATES OF AMERICA, Plaintiff, v. WESTERN ELECTRIC COMPANY, INC., AND AMERICAN TELEPHONE AND TELEGRAPH COMPANY, Defendants.	Civil Action No. 82-0192
UNITED STATES OF AMERICA, Plaintiff, v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al., Defendants.	Misc. No. 82-0025 (PI)

MEMORANDUM

On August 19, 1982, the government filed a memorandum expressing its acceptance of the modifications suggested by the Court in its Opinion of August 11, 1982.[1] At the same time, it asked the Court to consider altering the modification which permits the divested Operating Companies to provide all types of customer premises equipment (CPE) so as to restrict these companies to the provision of "residential and single-line business customer premises equipment."

As both the government and the Court have recognized, before an inherently anticompetitive restriction of this kind may be imposed, it would be necessary to consider the practical likelihood that the Operating Companies would successfully engage in anticompetitive conduct, and that it would be necessary also to consider the procompetitive effect, if any, of their entry into the particular market. Opinion of August 11, 1982, at 100-103. An analysis based on these factors indicates that the restriction sought by the government would not be in the public interest.[2]

The government's proposal is based exclusively[3] on the rationale that if the Operating Companies were allowed to sell complex CPE,[4] they would have the incentive and the ability to discriminate in the installation and maintenance[5] of equipment provided by others.

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[1] On the same day, AT&T filed a memorandum indicating its assent to all of the modifications required by the Court.

[2] Comments submitted by third parties on the CPE issue more or less contemporaneously with the government's memorandum do not add significantly to arguments previously considered by the Court, and they do not alter its conclusions.

[3] The government does not appear to dispute the Court's finding that there is little likelihood that the Operating Companies would conspire with a manufacturer in providing advance access to information concerning network standards, or that they would impose artificial interconnection restrictions on equipment provided by others. Department of Justice Memorandum at 3-4.

[4] The government specifically mentions PBXs and key telephone systems.

[5] Testing and restoration are also referred to in the government's memorandum.

The Operating Companies are unlikely to engage in this kind of behavior for at least three interrelated reasons: (1) the divested Operating Companies will be relatively small corporations with far fewer opportunities for anticompetitive conduct in CPE marketing than were available to the vast, nationwide, vertically-integrated Bell System; (2) the incentive and the ability of the Operating Companies to engage in such conduct will be further reduced by the lack of their own manufacturing arm and their need, therefore, to market the products of others; and (3) the type of anticompetitive activity which the government fears would be difficult to conceal, and it is for that reason an unlikely candidate for adoption by the Operating Companies. The risk that the Operating Companies would engage in such conduct is therefore quite small. When that remote risk is balanced against the certainty that the Operating Companies would be a strong counterweight to the domination of the customer premises market by AT&T, the Court can only conclude that the restriction proposed by the government is not justified.

1. When AT&T allegedly engaged in its anticompetitive activities in the customer premises market, it was the giant in the telecommunications industry, offering the full range of telecommunications products and services on a nationwide basis. The Operating Companies, by contrast, will be relatively small, geographically dispersed corporations.[6] They will be limited to a narrow range of products and services; they will not be permitted to manufacture CPE; and they will not have a base either in embedded equipment or in existing retail outlets or other marketing facilities. Thus, they will enter the CPE market with a zero market share — certainly a difficult starting point from which to establish a monopoly position. They will also lack the ability to use various components and affiliates in the pursuit and concealment of anticompetitive conduct.

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[6] To be sure, these companies will have a monopoly in the local telephone business just as does the Bell System at the present time; but except for that single circumstance, there is no similarity between them and the Bell System, either generally or with regard to their ability to act anticompetitively. See opinion of August 11, 1982, at 101-02.

2. The Court has previously explained why the inability of the Operating Companies to manufacture their own CPE will inhibit anticompetitive conduct with respect to its marketing of such equipment. Opinion of August 11, 1982 at 110-111. The need to coordinate with other companies in the pursuit of illegal conduct increases the difficulty of achieving success, enhances the risk of detection, and reduces the ultimate financial gain.[7] For those reasons, it also reduces the likelihood that an Operating Company will engage in such conduct.

3. The Operating Companies could induce customers to buy from them — rather than from other, lower-priced sellers — only if they made it known, by word or deed, that they would install and maintain their own equipment more rapidly or more efficiently than the equipment sold by others. Thus, the government's argument necessarily assumes that, if discrimination in installation and maintenance is to occur, it will be done relatively openly.[8] That being so, it may reason-

[7] The government assumes that the Operating Companies will market the equipment of only a limited number of manufacturers. Department of Justice Memorandum at 5. It is clear, however, that the Operating Companies' existing relationship to telephone subscribers will make them a desirable marketing entity for any equipment manufacturer. Thus, although the Operating Companies would probably not market the equipment of all manufacturers, they may be expected to market that of more than one or two companies. Were they to fail to do so, distinctions in treatment with respect to the installation and maintenance of the equipment of other manufacturers would be that much more suspicious. See *infra*.

[8] In this respect, too, the Operating Companies are in a far different position than was the Bell System. The latter's alleged discrimination in these respects centered primarily around the now-discarded requirement of a protective connecting arrangement. Moreover, AT&T had the ability to shift responsibility for installation, maintenance, and testing failures and delays among different components (*i.e.*, Operating Companies, Western Electric, Bell Laboratories) each having responsibilities for various phases of the process. The divested Operating Companies will be engaged only in the provision of intraexchange service, the production of the Yellow Pages, and the marketing of CPE, all in a single company and a single geographic area. Finally, with seven different Operating Companies involved in installation and maintenance, claims of one Operating Company that it had particular difficulties or problems with the equipment of manufacturers it did not sell could be readily undermined by a comparison with the practices of the other six companies.

ably be assumed that disadvantaged manufacturers or customers would quickly discover the offending practices and bring them to the attention of the Department of Justice for corrective action.[9] Given the high probability of disclosure, it is quite improbable that the Operating Companies would run this risk for relatively little gain.[10]

4. Balanced against the remote contingency that the Operating Companies would engage in anticompetitive conduct is the certainty that they would provide healthy competition for AT&T. After the reorganization, AT&T will be able to manufacture CPE; it will retain all the CPE located in the homes and businesses of the American public at the time of divestiture; and it will have ownership and control of the Bell System's nationwide chain of retail facilities and of the personnel necessary for the sale and marketing of this equipment. Allowing the Operating Companies to engage in providing CPE will serve as a useful competitive check on AT&T, not only deterring the possibility of anticompetitive behavior but also benefitting consumers by increasing the number of equipment providers in the market place.

For these reasons, as well as for the reasons more broadly discussed in the opinion of August 11, 1982, it is the Court's conclusion that it would not be in the public interest to prevent the Operating Companies from entering the CPE market, and the request of the Department of Justice will be denied.

In accordance with the opinion of August 11, 1982, and in view of the parties' assent to the modifications, the Court expects that a modified decree will be submitted not later

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[9] Nothing in the decree immunizes the Operating Companies from either government or private antitrust action should they, contrary to the Court's expectations, engage in improper activities.

[10] Contrary to the government's assertion, it is far from certain that mere preferences in installation and maintenance would be determinative of consumer decisions regarding the purchase of sophisticated customer premises equipment.

than August 26, 1982, which it will then promptly approve and enter on the court record.

Harold H. Greene
United States District Judge

Dated: August 23, 1982

ORDER ADMITTING ADDITIONAL PARTIES

(Entered October 14, 1982)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. WESTERN ELECTRIC COMPANY, INC., AND AMERICAN TELEPHONE AND TELEGRAPH COMPANY, Defendants.	Civil Action No. 82-0192
UNITED STATES OF AMERICA, Plaintiff, v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al., Defendants.	

ORDER

In its opinion of August 11, 1981, the Court stated that, in connection with post-judgment proceedings, it would grant intervenor status "to all those who have filed requests or motions for intervention." Opinion at 164. On August 26, 1982, an order was issued pursuant thereto granting such status to 108 different organizations. Since that time, a number of additional organizations have filed motions to intervene in these proceedings.

Several of these movants are entitled to intervene under standards previously established by the Court. In its order

of August 26, 1982, the Court granted intervenor status not only to who had filed briefs in response to the Court's order of May 25, 1982. Organizations which had actually filed briefs seemed to have indicated thereby a sufficient interest in further participation to allow them to become intervenors. Moreover, the complexities of the briefing procedure and the limited time available made it somewhat difficult to determine which of the various briefing parties was technically requesting intervenor status. In a spirit of liberality, all these organizations were accordingly permitted to intervene and, in keeping with this approach, two of the pending requests for intervention will likewise be granted. While the wish of these two organizations to participate as intervenors may not have been entirely clear when the Court issued its order of August 26, 1982, a further search of the record reveals that their previously filed motions or briefs are an adequate basis on which to accord to these movants the same status as was granted to others on August 26, 1982.

On the other hand, eight of the present movants have heretofore filed neither motions to intervene nor briefs. Some of these movants did file comments when the proposed decree was first made public — as did some 600 other individuals and organizations — while others did not participate even to that limited extent. As previously explained (see Opinion at 162-163), the Court has wide discretion under the Tunney Act with respect to intervention. In the Court's view, it would be inappropriate in the exercise of that discretion to grant intervenor status on an ongoing basis to individuals or organizations who did not apply for such status before judgment was entered on August 24, 1982. With today's order some 109 organizations representing the most diverse interests are participating in these cases as intervenors. The Court will not expand further the number of parties to this lawsuit.[1]

Finally, the Federal Communications Commission, to which the Court granted intervenor status on August 26, 1982, on the basis of the rationale discussed above, has advised the

[1] However, as in the past, pertinent and useful information and views even if offered by non-parties, will still be considered by the Court and, it may be assumed, by the Department of Justice.

Court that it does not wish to be accorded this status but prefers to continue as an *amicus curiae*. This request will, of course, be granted.

For the reasons stated it is this 14th day of October, 1982,

ORDERED That the motions to intervene of the Alabama Public Service Commission and the Alarm Industry Telecommunications Committee be and they are hereby granted, and such organizations be and they are hereby accorded the same rights as the parties who were permitted to intervene on August 26, 1982, and it is further

ORDERED That the motions to intervene of the Telephone Equipment Corporation, Pittway Corporation, International Mobile Machines, Centel Corporation, the Association of Long Distance Telephone Companies, the Illinois Commerce Commission, the Tele-Communications Association, and the Rochester Telephone Corporation, be and they are hereby denied, and it is further

ORDERED That the Federal Communications Commission be and it is hereby stricken as an intervenor and restored to its prior status as an *amicus curiae*.

Harold H. Greene
United States District Judge

ORDER GRANTING CERTIFICATION

(Entered November 10, 1982)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA Plaintiff, v. WESTERN ELECTRIC COMPANY, INC., AND AMERICAN TELEPHONE AND TELEGRAPH COMPANY, Defendants.	Civil Action No. 82-0192

ORDER

15 U.S.C. § 29(b) (the Expediting Act) provides in part that

> An appeal from a final judgment [in a Sherman Act case brought by the United States] shall lie directly to the Supreme Court if, upon application of a party filed within fifteen days of the filing of a notice of appeal, the district judge who adjudicated the case enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice.

Motions for certification of the above-entitled case to the Supreme Court pursuant to this Act have been filed by the United States[1] and three intervenors (the States of Maryland,

[1] The United States has advised the Court that "this is the first case in which the government has found it appropriate to seek certification under the Expediting Act." Memorandum, p. 4.

Alabama, and Tennessee). These motions are being supported by AT&T (one of the original parties to this lawsuit) and the following intervenors: the states of Arizona, Delaware, Missouri, New Hampshire, North Carolina, Wisconsin, Virginia, and Illinois; Jack Faucett Associates, Inc., et al.; Public Service Commission of Wisconsin; Public Service Commission of Kentucky; Public Service Commission of West Virginia; and the South Dakota Public Utilities Commission.[2]

The Court has carefully considered these requests, and it has concluded that certification of the appeals to the Supreme Court is appropriate for three separate but interrelated reasons.

First. The judgment entered by this Court,[3] on August 24, 1982,[4] provides directly for a vast reorganization of AT&T,[5] and indirectly it may be expected to cause far-reaching changes in both the private and public segments of the American telecommunications industry.

Under the terms of the judgment, AT&T must divest itself of all of its local operating companies by February 24, 1984.[6] In order to accomplish the reorganization by that time, complex and extensive preparations are currently under way.[7]

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[2] 110 public and private entities and organizations were permitted to intervene in the proceedings in this Court, and nineteen of these have taken appeals. Sixteen of these intervenor-appellants support the application for certification, one appellant (Tandy Corporation) opposes certification, and the remaining appellants have not taken a position on the issue. One entity (Telephonic Equipment Corporation) which was denied intervenor status by order of October 14, 1982, has filed a notice of appeal and a motion for certification of direct appeal to the Supreme Court.

[3] The judgment is technically referred to as a modification of the consent decree entered in 1956. See the order dated August 24, 1982.

[4] The judgment and the issues raised thereby are more fully explained in an opinion issued on August 11, 1982.

[5] AT&T is the largest corporation in the United States with assets of over $144 billion and annual earnings of over $52 billion. For further details, see note 85 of the August 11 opinion.

[6] AT&T has represented publicly that it will attempt to complete the divestiture by January 1, 1984.

[7] AT&T has submitted to the Department of Justice and to the Court a complex plan for the division, in all geographic regions of the United States,

These preparations include, for example, arrangements that will ultimately facilitate the distribution of assets and liabilities between AT&T and the divested operating companies. The spill-over effects of the reorganization may be expected to be similarly massive, and some private and public interests may already be delaying important business and regulatory decisions pending approval of the final reorganization plan. Moreover, the ability of AT&T and its various components to continue to market bond issues will inevitably be affected both by uncertainty and delay.

Should the various reorganization activities be stayed pending final resolution of the appeals, conditions within AT&T and, more importantly, within the entire telecommunications industry are likely to be extremely unsettled during the period of the delay. On the other hand, if there is no stay, and the appeals take their normal course through the Court of Appeals and thereafter by certiorari to the Supreme Court, the reorganization is likely to be completed before there has been a final resolution of the appellate process, and it would probably be impossible as a practical matter to restore the status quo ante. Immediate consideration of the appeals by the Supreme Court would largely avoid all of these problems.

Second. In connection with the entry of its judgment, the Court decided a number of issues that are of significant importance to the administration of justice. Among these are the extent of the power of a district court to require modifications of a consent decree in the exercise of its jurisdiction under 15 U.S.C. § 16(b)–(h) (the Tunney Act); the authority of a federal antitrust court to grant or approve the necessary relief even if certain aspects of the decree may affect state laws or regulations; and the authority of the court to restrict the use of the consent decree by private parties. It is not clear whether each of these issues[8] would independently and

between the areas to be served after the reorganization by the newly-independent local telephone operating companies and the areas to be served by the remainder of AT&T and other long distance telecommunications companies.

[8] Many other matters were decided by this Court in the course of these proceedings; however, it appears that the appeals will be limited to a relatively narrow range of questions.

in the abstract deserve Supreme Court review, although some of them might well deserve such review in any event. Beyond that, for the reasons noted *supra*, delay at the review stage would be contrary to the strong public interest in an early and final resolution of all the issues.

At the same time, it would not be in the public interest or the administration of justice to have two review proceedings involving this one case proceeding simultaneously — one by way of an immediate appeal to the Supreme Court and the other by a more lengthy review proceeding through the Court of Appeals. Such a procedure would also be contrary to the basic purpose of the Expediting Act.

Third. In the course of the proceedings leading to the final judgment, several representatives of various States and public utility commissions indicated that they expect to seek injunctive orders in federal courts in their own areas against the enforcement of the judgment herein to the extent that this judgment might conflict with state regulatory laws or policies. It is thus at least conceivable, if not likely that, unless the issues are resolved on an expedited basis by the Supreme Court, conflicts between judicial districts and even between circuits would arise concerning the validity and enforceability of the judgment herein, with the attendant geographical confusion regarding the reorganization.

For these reasons, the Court certifies this 10th day of November, 1982, that immediate consideration of the appeals taken herein[9] by the Supreme Court is of general public importance in the administration of justice.

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[9] That is, the appeals of the Alabama Public Service Commission; South Dakota Public Utilities Commission; North American Telephone Association; State of Maryland; Public Service Commission of West Virginia; Virgina State Corporation Commission; Tandy Corporation; Public Service Commission of Wisconsin; Jack Faucett Associates, Inc., et al.; State of Illinois; State of Tennessee; and the States of Arizona, Delaware, Missouri, New Hampshire, North Carolina, Wisconsin, the Commonwealth of Virginia, and the Kentucky Public Service Commission.

This order and the accompanying papers[10] shall forthwith be filed in this Court and transmitted to the Clerk of the Supreme Court, with copies to the Clerk of the Court of Appeals.

S/_____
Harold H. Greene
United States District Judge

[10] Attached to this order are the judgment of August 24, 1982, the opinion of August 11, 1982, a separate order issued on August 24, 1982, and the motions and memoranda filed by various parties regarding the certification question.

NOTICE OF APPEAL OF STATE OF ALABAMA AND ALABAMA PUBLIC SERVICE COMMISION

(Filed November 4, 1982)

MARK D. WILKERSON
Alabama Public Service Commission
State Office building
501 Dexter Avenue
P. O. Box 991
Montgomery, Alabama 36102
(205) 832-6282

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. WESTERN ELECTRIC COMPANY, INC., AND AMERICAN TELEPHONE AND TELEGRAPH COMPANY, Defendants.	Civil Action No. 82-0192

NOTICE OF APPEAL

Notice is hereby given that the State of Alabama and the Alabama Public Service Commission hereby appeals to the United States Court of Appeals from the order of the United States District Court for the District of Columbia of August 11, 1982.

S/_____
Mark D. Wilkerson
Special Assistant Attorney General

Attorney for the Alabama Public Service Commission

State Office Building
501 Dexter Avenue
P.O. Box 991
Montgomery, Alabama 36102
(205) 832-6282

AMENDED NOTICE OF APPEAL OF STATE OF ALABAMA AND ALABAMA PUBLIC SERVICE COMMISSION

(Filed November 4, 1982)

MARK D. WILKERSON
Alabama Public Service Commission
State Office Building
501 Dexter Avenue
P. O. Box 991
Montgomery, Alabama 36102
(205) 832-6282

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. WESTERN ELECTRIC COMPANY, INC., AND AMERICAN TELEPHONE AND TELEGRAPH COMPANY, Defendants.	Civil Action No. 82-0192

AMENDED NOTICE OF APPEAL

In the Notice of Appeal filed with the Court on November 4, 1982, the wrong date was inadvertently given for the Modification of Final Judgment. The Notice should be amended to read:

Notice is hereby given that the State of Alabama and the Alabama Public Service Commission hereby appeal to the United States Court of Appeals from the order of the United

States District Court for the District of Columbia of August 24, 1982.

S/_____
Mark D. Wilkerson
Special Assistant Attorney General

Attorney for the Alabama Public Service Commission

State Office Building
501 Dexter Avenue
P. O. Box 991
Montgomery, Alabama 36102
(205) 832-6282

NOTICE OF APPEAL OF STATES OF ARIZONA, DELAWARE, MISSOURI, NEW HAMPSHIRE, NORTH CAROLINA, WISCONSIN, THE COMMONWEALTH OF VIRGINIA AND THE KENTUCKY PUBLIC SERVICE COMMISSION

(Filed November 5, 1982)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. WESTERN ELECTRIC COMPANY, INC., AND AMERICAN TELEPHONE AND TELEGRAPH COMPANY, Defendants.	Civil Action No. 82-0192

NOTICE OF APPEAL

Notice is hereby given that the States of Arizona, Delaware, Missouri, New Hampshire, North Carolina, Wisconsin, the Commonwealth of Virginia and the Kentucky Public Service Commission appeal to the United States Court of Appeals for the District of Columbia from the Modification of Final Judgment entered by this Court in the above-captioned case on August 24, 1982.

Dated: November 5, 1982
0568Y

Respectfully submitted,

OF COUNSEL:

STEPHEN H. SACHS
Attorney General

CHARLES O. MONK, II
Assistant Attorney General
and Chief Antitrust Division

ALAN M. BARR
Assistant Attorney General
The Munsey Building
7 North Calvert Street
Baltimore, Maryland 21202
(301) 576-6470

ROBERT K. CORBIN
Attorney General

ANTHONY B. CHING
Solicitor General
1275 W. Washington Street
Phoenix, Arizona 85007
(602) 255-3333

Attorneys for the State of Arizona

RICHARD S. GEBELEIN
Attorney General

VINCENT M. AMBERLY
Deputy Attorney General
820 North French Street
Wilminton, DE 19801
(302) 571-2514

Attorneys for the State of Delaware

JOHN ASHCROFT
Attorney General

EDWARD D. ROBERTSON, JR.
Deputy Attorney General
P. O. Box 899
Jefferson City, MO 65102
(314) 751-2616

Attorneys for the State of Missouri

GREGORY H. SMITH
Attorney General

EDWARD E. LAWSON
Antitrust Counsel
State House Annex
Concord, New Hampshire
03301
(603) 271-3640

Attorneys for the State of
New Hampshire

H. A. COLE, JR.
Special Deputy Attorney
General
Chief, Antitrust Division

FRED R. GAMIN
Assistant Attorney General
North Carolina Department
of Justice
P. O. Box 629
Raleigh, North Carolina
27602
(919) 733-3786

Attorneys for the State of
North Carolina

BRONSON C.
LAFOLLETTE
Attorney General

MICHAEL L. ZALESKI
Assistant Attorney General

KEVIN J. O'CONNOR
Assistant Attorney General
Antitrust and Criminal
Litigation Unit
P. O. Box 7857
Madison, WI 53707
(608) 266-3016

Attorneys for the State of
Wisconsin

GERALD L. BALILES
Attorney General

WILLIAM G. BROADDUS
Chief Deputy Attorney
General

ELIZABETH B. LACY
Deputy Attorney General

ANTHONY
GAMBARDELLA
Assistant Attorney General
101 N. 8th Street
Richmond, Virginia 23219
(804) 786-7373

Attorneys for the
Commonwealth of
Virginia

WILLIAM M. SAWYER
ELLYN ELISE
PAUL M. CUPP
JOHN H. HUGHES
730 Schenkel Lane
Frankfort, Kentucky 40602
(502) 564-7374

Attorneys for the Kentucky
Public Service
Commission

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of November, 1982, service of the foregoing Notice of Appeal was made by delivering sufficient copies for each counsel of record to the Clerk of the United States District Court for the District of Columbia.

S/_____

ALAN M. BARR
Assistant Attorney General

NOTICE OF APPEAL OF STATE OF ILLINOIS

(Filed November 1, 1982)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INC.; AND BELL TELEPHONE LABORATORIES, INC., Defendants.	Civil Action No. 74-1698
UNITED STATES OF AMERICA, Plaintiff, v. WESTERN ELECTRIC COMPANY, INC., AND AMERICAN TELEPHONE AND TELEGRAPH COMPANY, Defendants.	Civil Action No. 82-0192
UNITED STATES OF AMERICA, Plaintiff, v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al. Defendants.	Misc. No. 82-0025 (PI)

NOTICE OF APPEAL

Notice is hereby given that the People of the State of Illinois appeal to the United States Court of Appeals for the District of Columbia Circuit from the orders of the District Court, filed August 24, 1982, modifying the judgment in *United States v. Western Electric Company, Inc. et al.*, Civil Action No. 82-0192, and dismissing the action in *United States v. American Telephone and Telegraph Co., et al.*, Civil Action No. 74-1698.

DATED: October 29, 1982

TYRONE C. FAHNER
Attorney General of Illinois

BY: _____
Fredric D. Tannenbaum
Assistant Attorney General

Fredric D. Tannenbaum
Assistant Attorney General
Public Utilities Division
188 West Randolph Street, Suite 2315
Chicago, Illinois 60601 (312) 793-7780

NOTICE OF APPEAL OF STATE OF MARYLAND

(Filed October 25, 1982)

IN THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. WESTERN ELECTRIC COMPANY, INC., AND AMERICAN TELEPHONE AND TELEGRAPH COMPANY, Defendants.	Civil Action No. 82-0192

NOTICE OF APPEAL

Notice is hereby given that the State of Maryland appeals to the United States Court of Appeals for the District of Columbia Circuit from the Modification of Final Judgment entered by this Court in *United States of America v. Western Electric Company, Inc. and American Telephone and Telegraph Company*, Civil Action No. 82-0192, on August 24, 1982.

DATED: October 25, 1982

STEPHEN H. SACHS
Attorney General

S/_____
CHARLES O. MONK, II
Assistant Attorney General and
Chief, Antitrust Division

S/_____
ALAN M. BARR
Assistant Attorney General
The Munsey Building, 3rd Floor
Seven North Calvert Street
Baltimore, Maryland 21202
(301) 576-6470

Attorneys for the State of Maryland

(Certificate of Service Omitted)

NOTICE OF APPEAL OF NORTH AMERICAN TELEPHONE ASSOCIATION

(Filed October 25, 1982)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY: WESTERN ELECTRIC COMPANY, INC.; AND BELL TELEPHONE LABORATORIES, INC., Defendants.	Civil Action No. 74-1698

Record Consolidated With

UNITED STATES OF AMERICA, Plaintiff, v. WESTERN ELECTRIC COMPANY, INC., AND AMERICAN TELEPHONE AND TELEGRAPH COMPANY, Defendants, NORTH AMERICAN TELEPHONE ASSOCIATION, Intervenor,	Civil Action No. 82-0192

Record Consolidated With

UNITED STATES OF AMERICA,

Plaintiff,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al.,

Defendants,

NORTH AMERICAN TELEPHONE ASSOCIATION,

Intervenor.

Misc. No. 82-0025 (PI)

NOTICE OF APPEAL

Notice is hereby given that Intervenor North American Telephone Association, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the "Modification of Final Judgment," bearing the caption Civil Action No. 82-0192, approved by Order of this Court entered on August 24, 1982.

Respectfully submitted

NORTH AMERICAN TELEPHONE ASSOCIATION

By _____
Albert H. Kramer

Cohn and Marks
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Its Attorneys

October 25, 1982

NOTICE OF APPEAL OF SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

(Filed November 4, 1982)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY, WESTERN ELECTRIC COMPANY, INC., and BELL TELEPHONE LABORATORIES, INC. Defendants.	Civil Action No. 74-1698
UNITED STATES OF AMERICA, Plaintiff, v. WESTERN ELECTRIC COMPANY, INC. and AMERICAN TELEPHONE AND TELEGRAPH COMPANY, Defendants, SOUTH DAKOTA PUBLIC UTILITIES COMMISSION, Intervenor.	Civil Action No. 82-0192

UNITED STATES OF AMERICA Plaintiff, v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al., Defendants, SOUTH DAKOTA PUBLIC UTILITIES COMMISSION, Intervenor.	Civil Action No. 82-0025 (PI)

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the South Dakota Public Utilities Commission, Intervenor, by its undersigned attorneys, pursuant to Rule 4(a)(3), hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the Modification of Final Judgment in the captioned matters, approved and entered by order of this Court on August 24, 1982.

DATED this 4th day of November, 1982.

Respectfully submitted,
ROTHGERBER, APPEL & POWERS

By: _____

James M. Lyons
Attorneys for South Dakota
Public Utilities Commission
1600 Broadway, Suite 2400
Denver, Colorado 80202
Telephone (303) 861-2600

(Certificate of Service Omitted)

NOTICE OF APPEAL OF TANDY CORPORATION

(Filed November 1, 1982)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff v. WESTERN ELECTRIC COMPANY, INC., and AMERICAN TELEPHONE AND TELEGRAPH COMPANY, Defendants.	Civil Action No. 82-0192

NOTICE OF APPEAL BY INTERVENOR TANDY CORPORATION

Notice is hereby given that Intervenor Tandy Corporation hereby appeals, pursuant to Rule 4(a)(3) of the Federal Rules of Appellate Procedure, to the United States Court of Appeals for the District of Columbia Circuit from the "Modification of Final Judgment" approved by Order of this Court entered on August 24, 1982.

Malcolm R. Pfunder

Hamel, Park, McCabe & Saunders
888 Sixteenth Street Northwest
Washington, D.C. 20006

(202) 835-8062
Attorneys for Tandy Corporation

Dated: November 1, 1982

NOTICE OF APPEAL OF STATE OF TENNESSEE

(Filed October 25, 1982)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INC.; and BELL TELEPHONE LABORATORIES, INC., Defendants.	Civil Action No. 74-1698
UNITED STATES OF AMERICA, Plaintiff, v. WESTERN ELECTRIC COMPANY, INC., and AMERICAN TELEPHONE AND TELEGRAPH COMPANY, Defendants.	Civil Action No. 82-0192
UNITED STATES OF AMERICA, Plaintiff, v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et. al., Defendants.	Misc. No. 82-0025 (PI)

NOTICE OF APPEAL

Notice is hereby given that the State of Tennessee, intervenor in the above-styled matter, hereby appeals by and through the regulatory agency Public Service Commission, to the United States Court of Appeals for the District of Columbia Circuit from the Order (of Dismissal) and Modification of Final Judgment (Order) entered in this action of the 24th day of August, 1982.

HENRY M. WALKER
General Counsel for the Public Service Commission appearing on behalf of the State of Tennessee
Cordell Hull Building
Nashville, Tennessee 37219

NOTICE OF APPEAL OF TENNESSEE PUBLIC SERVICE COMMISSION

(Filed October 25, 1982)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA Plaintiff, v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INC.; and BELL TELEPHONE LABORATORIES, INC., Defendants.	Civil Action No. 74-1698
UNITED STATES OF AMERICA, Plaintiff, v. WESTERN ELECTRIC COMPANY, INC., and AMERICAN TELEPHONE AND TELEGRAPH COMPANY, Defendants.	Civil Action No. 82-0192
UNITED STATES OF AMERICA Plaintiff, v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al., Defendants.	Misc. No. 82-0025 (PI)

NOTICE OF APPEAL

Notice is hereby given that the Tennessee Public Service Commission, intervenor in the above styled matter, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the Order (of Dismissal) and Modification of Final Judgment (Order) entered in this action on the 24th day of August, 1982.

Henry M. Walker
General Counsel for the
Tennessee Public Service
Commission
Cordell Hull Building
Nashville, Tennessee 37219

NOTICE OF APPEAL OF VIRGINIA STATE CORPORATION COMMISSION FROM MODIFICATION OF FINAL JUDGMENT

(Filed October 25, 1982)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. WESTERN ELECTRIC COMPANY, INC. AND AMERICAN TELEPHONE AND TELEGRAPH COMPANY, Defendants.	Civil Action No. 82-0192
UNITED STATES OF AMERICA, Plaintiff, v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al., Defendants.	Misc. No. 82-0025 (PI)

NOTICE OF APPEAL

Notice is hereby given that the Virginia State Corporation Commission, an interested person granted intervenor Status in the above-styled proceeding, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the Modification of Final Judgment, entered by the United States District Court for the District of Columbia on the 24th day of August, 1982.

Virginia State Corporation Commission

By _____
Russell W. Cunningham
Associate General Counsel
State Corporation Commission

Russell W. Cunningham
Associate General Counsel
Lewis S. Minter
General Counsel
Sherry H. Bridewell
Attorney
Box 1197
Richmond, Virginia 23209

NOTICE OF APPEAL OF VIRGINIA STATE CORPORATION COMMISSION FROM ORDER OF AUGUST 26, 1982

(Filed October 25, 1982)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. WESTERN ELECTRIC COMPANY, INC. AND AMERICAN TELEPHONE AND TELEGRAPH COMPANY, Defendants.	Civil Action No. 82-0192
UNITED STATES OF AMERICA, Plaintiff, v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al., Defendants.	Misc. No. 82-0025 (PI)

NOTICE OF APPEAL

Notice is hereby given that the Virginia State Corporation Commission, an interested person granted intervenor Status in the above-styled proceeding, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit

from this Court's order, setting forth the names of persons granted intervenor status, and setting out the rights of those persons granted intervenor status, entered the 26th day of August, 1982.

Virginia State Corporation Commission

By _____
Russell W. Cunningham
Associate General Counsel
State Corporation Commission

Russell W. Cunningham
Associate General Counsel
Lewis S. Minter
General Counsel
Sherry H. Bridewell
Attorney
P.O. Box 1197
Richmond, Virginia 23209

NOTICE OF APPEAL OF PUBLIC SERVICE COMMISSION OF WEST VIRGINIA

(Filed November 4, 1982)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. WESTERN ELECTRIC COMPANY, INC., AND AMERICAN TELEPHONE AND TELEGRAPH COMPANY, Defendants.	Civil Action No. 82-0192

NOTICE OF APPEAL

Notice is hereby given that the Public Service Commission of West Virginia Intervenor in the above-referenced proceeding hereby appeals to the United States Court of Appeals for the District of Columbia from the Order of the Court entered in this section on August 24, 1982.

Robert R. Rodecker
General Counsel

Joel B. Shifman
Counsel for the
Public Service Commission of West Virginia

November 4, 1982

NOTICE OF APPEAL OF PUBLIC SERVICE COMMISSION OF WISCONSIN

(Filed October 29, 1982)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA Plaintiff, v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INC.; AND BELL TELEPHONE LABORATORIES, INC., Defendants.	Civil Action No. 74-1698
UNITED STATES OF AMERICA Plaintiff, v. WESTERN ELECTRIC COMPANY, INC., AND AMERICAN TELEPHONE AND TELEGRAPH COMPANY, Defendants.	Civil Action No. 82-0192
UNITED STATES OF AMERICA, Plaintiff, v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al., Defendants.	Misc. No. 82-0025 (PI)

NOTICE OF APPEAL

Notice is hereby given that the Public Service Commission of Wisconsin, an interested party granted intervenor status in the above-styled proceeding, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the Modification of Final Judgment, entered by the United States District Court for the District of Columbia on the 24th day of August, 1982.

Respectfully submitted,

Philip J. Mause
Norman A. Pedersn
Peggy Kobacker Shiffrin
Diane B. Cohn
Kadison, Pfaelzer, Woodard, Quinn & Rossi
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 452-8300

Steven M. Schur
Chief Counsel
The Public Service Commission of Wisconsin
4802 Sheboygan Avenue
P.O. Box 7854
Madison, Wisconsin 53707

COUNSEL FOR THE PUBLIC SERVICE COMMISSION OF WISCONSIN

Dated: October 29, 1982

CERTIFICATE OF SERVICE

I hereby certify that on this *29th* day of October, 1982, copies of the foregoing Notice of Appeal were mailed to the persons and organizations set forth in the attached service list via first class mail, postage prepaid.

Philip J. Mause

CONSTITUTION OF THE UNITED STATES

U.S. Const., art. I, § 8, cl. 3:

The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . .

U.S. Const., art. VI, cl. 2:

This Constitution, and laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

15 U.S.C. § 2:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 16:

(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken. Nothing contained in this section shall be construed to impose any limitation on the application of collateral estoppel, except that, in any action or proceeding brought under the antitrust laws, collateral estoppel effect shall not be given to any finding made by the Federal Trade Commission under the antitrust laws or under section 45 of this title which could give rise to a claim for relief under the antitrust laws.

(b) Any proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws shall be filed with the district court before which such proceeding is pending and published by the United States in

the Federal Register at least 60 days prior to the effective date of such judgment. Any written comments relating to such proposal and any responses by the United States thereto, shall also be filed with such district court and published by the United States in the Federal Register within such sixty-day period. Copies of such proposal and any other materials and documents which the United States considered determinative in formulating such proposal, shall also be made available to the public at the district court and in such other districts as the court may subsequently direct. Simultaneously with the filing of such proposal, unless otherwise instructed by the court, the United States shall file with the district court, publish in the Federal Register, and thereafter furnish to any person upon request, a competitive impact statement which shall recite —

(1) the nature and purpose of the proceeding;

(2) a description of the practices or events giving rise to the alleged violation of the antitrust laws;

(3) an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief;

(4) the remedies available to potential private plantiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;

(5) a description of the procedures available for modification of such proposal; and

(6) a description and evaluation of alternatives to such proposal actually considered by the United States.

(c) The United States shall also cause to be published, commencing at least 60 days prior to the effective date of the judgment described in subsection (b) of this section, for 7 days over a period of 2 weeks in newspapers of general circulation of the district in which the case has been filed, in the District of Columbia, and in such other districts as the court may direct —

(i) a summary of the terms of the proposal for the consent judgment,

(ii) a summary of the competitive impact statement filed under subsection (b) of this section,

(iii) and a list of the materials and documents under subsection (b) of this section which the United States shall make available for purposes of meaningful public comment, and the place where such materials and documents are available for public inspection.

(d) During the 60-day period as specified in subsection (b) of this section, and such additional time as the United States may request and the court may grant, the United States shall receive and consider any written comments relating to the proposal for the consent judgment submitted under subsection (b) of this section. The Attorney General or his designee shall establish procedures to carry out the provisions of this subsection, but such 60-day time period shall not be shortened except by order of the district court upon a showing that (1) extraordinary circumstances require such shortening and (2) such shortening is not adverse to the public interest. At the close of the period during which such comments may be received, the United States shall file with the district court and cause to be published in the Federal Register a response to such comments.

(e) Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court may consider —

(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

(f) In making its determination under subsection (e) of this section, the court may —

(1) take testimony of Government officials or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate;

(2) appoint a special master and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the views, evaluations, or advice of any individual, group or agency of government with respect to any aspects of the proposed judgment or the effect of such judgment, in such manner as the court deems appropriate;

(3) authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae, intervention as a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate;

(4) review any comments including any objections filed with the United States under subsection (d) of this section concerning the proposed judgment and the responses of the United States to such comments and objections; and

(5) take such other action in the public interest as the court may deem appropriate.

(g) Not later than 10 days following the date of the filing of any proposal for a consent judgment under subsection (b) of this section, each defendant shall file with the district court a description of any and all written or oral communications by or on behalf of such defendant, including any and all written or oral communications on behalf of such defendant, or other person, with any officer or employee of the United States concerning or relevant to such proposal. except that any such communications made by counsel of record alone with the Attorney General or the employees of the Department of Justice alone shall be excluded from the requirements of this subsection. Prior to the entry of any consent judgment

pursuant to the antitrust laws, each defendant shall certify to the district court that the requirements of this subsection have been complied with and that such filing is a true and complete description of such communications known to the defendant or which the defendant reasonably should have known.

(h) Proceedings before the district court under subsections (e) and (f) of this section, and the competitive impact statement filed under subsection (b) of this section, shall not be admissible against any defendant in any action or proceeding brought by any other party against such defendant under the antitrust laws or by the United States under section 15a of this title nor constitute a basis for the introduction of the consent judgment as prima facie evidence against such defendant in any such action or proceeding.

(i) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 or 15c of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

15 U.S.C. § 29:

(a) Except as otherwise expressly provided by this section, in every civil action brought in any district court of the United States under the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890, or any other Acts having like purpose that have been or hereafter may be enacted, in which the United States is the complainant and equitable relief is sought,

any appeal from a final judgment entered in any such action shall be taken to the court of appeals pursuant to sections 1291 and 2107 of Title 28. Any appeal from an interlocutory order entered in any such action shall be taken to the court of appeals pursuant to sections 1292(a)(1) and 2107 of Title 28 but not otherwise. Any judgment entered by the court of appeals in any such action shall be subject to review by the Supreme Court upon a writ of certiorari as provided in section 1254(1) of Title 28.

(b) An appeal from a final judgment pursuant to subsection (a) of this section shall lie directly to the Supreme Court if, upon application of a party filed within fifteen days of the filing of a notice of appeal, the district judge who adjudicated the case enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice. Such order shall be filed within thirty days after the filing of a notice of appeal. When such an order is filed, the appeal and any cross appeal shall be docketed in the time and manner prescribed by the rules of the Supreme Court. The Supreme Court shall thereupon either (1) dispose of the appeal and any cross appeal in the same manner as any other direct appeal authorized by law, or (2) in its discretion, deny the direct appeal and remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal and any cross appeal therein had been docketed in the court of appeals in the first instance pursuant to subsection (a) of this section.

Ala. Code § 37-1-31 (1975):

The rights, powers, authority, jurisdiction and duties by this title conferred upon the commission shall be exclusive and, in respect of rates and service regulations and equipment, shall be exercised notwithstanding any rights heretofore acquired by the public under any franchise, contract or agreement between any utility and municipality, county or municipal subdivision of the state, and shall be exercised, so far as they may be exercised consistently with the Constitution of the state and of the United States, notwithstanding any right heretofore so acquired by any such utility.

Ala. Code § 37-1-32 (1975):

The public service commission shall have general supervision of all persons, firms and corporations operating utilities mentioned in this title, shall inquire into the management of the business and shall keep itself informed as to the manner and method in which the business is conducted. It shall examine such utilities as often as may be necessary to keep informed as to their general condition, their franchises, capitalization, rates and other charges, and the manner in which their plants, equipment and other property are owned, leased, controlled, managed, conducted and operated, not only with respect to adequacy, security and accommodation afforded by their service, but also with respect to their compliance with the provisions of this title, and any other law or laws, with the orders of the commission, and with the charter and franchise requirements. It shall assemble and keep on file, available for the use of the public, full statistics on the foregoing, as well as on all other matters or things connected with such utilities as is necessary to a full knowledge of their business and affairs.

Ala. Code § 37-1-40 (1975):

Every utility subject to the supervision of the public service commission, and all officers, agents and employees of the

same shall obey, observe and comply with every order made by the public service commission under the authority of this title.

Ala. Code § 37-1-43 (1975):

All the authority, powers and jurisdiction which have been given by law to the Alabama public service commission over utilities engaged in intrastate commerce in this state are hereby given to said commission over utilities whose principal place of business is located outside the state of Alabama, but who are engaged in this state in interstate commerce not regulated under the acts of the congress of the United States to the extent that the exercise by said commission of such authority, powers and jurisdiction over such utilities engaged in interstate commerce is permissible.

Ala. Code § 37-1-50 (1975):

No utility shall abandon all or any portion of its service to the public except ordinary discontinuance of service for nonpayment of charges, nonuser and similar reasons in the usual course of business, unless and until written application is first made to the commission for the issuance of a certificate that the present or future public convenience or necessity permits such abandonment and the issuance of such a certificate. Upon the filing of such application and after a hearing of all parties interested, the commission may or may not, in its discretion, issue such certificate.

Ala. Code § 37-2-5 (1975):

No transportation company subject to this chapter shall abandon all or any portion of its service to the public or the operation of any of its lines, properties or plant which would affect the service it is rendering the public, except ordinary discontinuances of service for nonpayment of charges, nonuser, violations of rules and regulations or similar reasons in the usual course of business, unless and until there shall first have been filed an application for a permit to abandon service

and obtained from the commission a permit allowing such abandonment.

Ala. Code § 37-2-171 (1975):

No telephone company shall issue any securities or assume any obligation or liability, as lessor, lessee, guarantor, endorser, surety or otherwise, in respect to the securities of any other person unless and until, and then only to the extent that, upon application by the company, and after investigation by the commission of the purposes and uses of the proposed issue, and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, the commission by order authorizes such issue or assumption. The commission shall make such order only if it finds that such issue or assumption is for some lawful object within the corporate purposes of the company, is compatible with the public interest, is necessary or appropriate for or consistent with the proper performance by the company of its service to the public as such telephone company, and will not impair its ability to perform that service, and is reasonably necessary and appropriate for such purpose. Any such order of the commission shall specify the purposes for which any such securities or the proceeds thereof may be used by the company making such application.

Ala. Code § 37-2-180 (1975):

Securities issued and obligations and liabilities assumed by a telephone company, for which under the provisions of this article the authorization of the commission is required, shall not be invalidated because issued or assumed without such authorization therefor having first been obtained or because issued or assumed contrary to any term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption. Securities issued or obligations or liabilities assumed in accordance with all the terms and conditions of the order of authorization therefor shall not be affected by a failure to comply with any provision of this article or rule or regulation of the commission

relating to procedure and other matters preceding the entry of such order or authorization or order supplemental thereto. A copy of any order made and entered by the commission as in this article provided (duly certified by the secretary of the commission) approving the issuance of any securities or the assumption of any obligation or liability by a telephone company shall, in and of itself, be sufficient evidence, for all purposes, of full and complete compliance by the applicant for such approval with all procedural and other matters required precedent to the entry of such order. Telephone companies, and their officers thereunto authorized, who willfully issue any such securities, or assume any such obligation or liability, or make any sale or other disposition of securities in violation of this article, or apply any securities or the proceeds thereof to purposes other than the purposes specified in an order of the commission with respect thereto, contrary to the provisions of this article, shall be liable to a penalty of not more than $10,000.00, but the company is only required to specify in general terms the purpose for which any securities are to be issued, or for which any obligation or liability is to be assumed, and the order of the commission with respect thereto shall likewise be in general terms.

Ariz. Const. art. 15, § 2:

All corporations other than municipal engaged in carrying persons or property for hire; or in furnishing gas, oil, or electricity for light, fuel, or power; or in furnishing water for irrigation, fire protection, or other public purposes; or in furnishing, for profit, hot or cold air or steam for heating or cooling purposes; or in transmitting messages or furnishing public telegraph or telephone service, and all corporations other than municipal, operating as common carriers, shall be deemed public service corporations.

Ariz. Const. art. 15, § 3:

The Corporation Commission shall have full power to, and shall, prescribe just and reasonable classifications to be used and just and reasonable rates and charges to be made and collected, by public service corporations within the State for service rendered therein, and make reasonable rules, regulations, and orders, by which such corporations shall be governed in the transaction of business within the State, and may prescribe the forms of contracts and the systems of keeping accounts to be used by such corporations in transacting such business, and make and enforce reasonable rules, regulations, and orders for the convenience, comfort, and safety, and the preservation of the health, of the employees and patrons of such corporations; Provided, that incorporated cities and towns may be authorized by law to exercise supervision over public service corporations doing business therein, including the regulation of rates and charges to be made and collected by such corporations; Provided further, that classifications, rates, charges, rules, regulations, orders, and forms or systems prescribed or made by said Corporation Commission may from time to time be amended or repealed by such Commission.

Ariz. Const. art. 15, § 4:

The Corporation Commission, and the several members thereof, shall have power to inspect and investigate the property, books, papers, business, methods, and affairs of any corporation whose stock shall be offered for sale to the public and of any public service corporation doing business within the State, and for the purpose of the Commission, and of the several members thereof, shall have the power of a court of general jurisdiction to enforce the attendance of witnesses and the production of evidence by subpoena, attachment, and punishment, which said power shall extend throughout the State. Said Commission shall have power to take testimony under commission or deposition either within or without the State.

Ariz. Const. art. 15, § 5:

The Corporation Commission shall have the sole power to issue certificates of incorporation to companies organizing under the laws of this State, and to issue licenses to foreign corporations to do business in this State, as may be prescribed by law.

Ariz. Const. art. 15, § 6:

The law-making power may enlarge the powers and extend the duties of the Corporation Commission, and may prescribe rules and regulations to govern proceedings instituted by and before it; but, until such rules and regulations are provided by law, the Commission may make rules and regulations to govern such proceedings.

Ariz. Const. art. 15, § 7:

Every public service corporation organized or authorized under the laws of the State to do any transportation or transmission business within the State shall have the right to construct and operate lines connecting any points within the State, and to connect at the State boundaries with like

lines; and every such corporation shall have the right with any of its lines to cross, intersect, or connect with, any lines of any other public service corporation.

Ariz. Const. art. 15, § 9:

Every public service corporation engaged in the business of transmitting messages for profit shall receive and transmit, without delay or discrimination, any messages delivered to it by any other public service corporation engaged in the business of transmitting messages for profit, and shall, with its lines, make physical connection with the lines of any public service corporation engaged in the business of transmitting messages for profit, under such rules and regulations as shall be prescribed by the Corporation Commission, or by law; Provided, that such public service corporations shall deliver messages to other such corporations, without delay or discrimination, under such rules and regulations as shall be prescribed by the Corporation Commission, or by law.

Ariz. Const. art. 15, § 12:

All charges made for service rendered, or to be rendered, by public service corporations within this State shall be just and reasonable, and no discrimination in charges, service, or facilities shall be made between persons or places for rendering a like and contemporaneous service, except that the granting of free or reduced rate transportation may be authorized by law, or by the Corporation Commission, to the classes of persons described in the Act of Congress approved February 11, 1887, entitled An Act to Regulate Commerce, and the amendments thereto, as those to whom free or reduced rate transportation may be granted.

Ariz. Const. art. 15, § 13:

All public service corporations and corporations whose stock shall be offered for sale to the public shall make such reports to the Corporation Commission, under oath, and provide such

information concerning their acts and operations as may be required by law, or by the Corporation Commission.

Ariz. Const. art. 15, § 14:

The Corporation Commission shall, to aid it in the proper discharge of its duties, ascertain the fair value of the property within the State of every public service corporation doing business therein; and every public service corporation doing business within the State shall furnish to the Commission all evidence in its possession, and all assistance in its power, requested by the Commission in aid of the determination of the value of the property within the State of such public service corporation.

Ariz. Const. art. 15, § 15:

No public service corporation in existence at the time of the admission of this State into the Union shall have the benefit of any future legislation except on condition of complete acceptance of all provisions of this Constitution applicable to public service corporations.

Ariz. Rev. Stat. Ann. § 40-201 (1975):

In this chapter, unless the context otherwise requires:

1. "Commission" means the Arizona corporation commission.

2. "Common carrier" means railroad or street railroad.

3. "Electric plant" includes all property used in connection with the production, transmission or delivery of electricity for light, heat or power for sale.

4. "Gas plant" includes all property used in connection with the production, transmission or delivery of gas for light, heat or power for sale.

5. "Pipe line" includes all property used in transmission for compensation of air, steam or fluid substances, except water, through pipe lines.

6. "Railroad" includes every railway, other than a street railroad, operated for public transporation of persons or property.

7. "Sewerage system" includes all property used in connection with the collection, treatment, purification and disposal transmission, storage or treatment of sewerage.

8. "Sewer corporation" includes every person owning, controlling, operating or managing any sewerage system for profit.

9. "Street railroad" includes every railway operated along any street or public way for public transportation of persons or property, but does not include a commercial or interurban railway.

10. "Telegraph line" includes all property used in connection with communication by telegraph for compensation with or without the use of transmission wires.

11. "Telephone line" includes all property used in connection with communication by telephone, for compensation, with or without the use of transmission wires.

12. "Transportation of persons" includes every service in connection with the carriage and delivery of a person and his baggage.

13. "Transporation of property" includes every service in connection with the transportation and handling of property.

14. "Water system" includes all property used in connection with the diversion, development, storage, distribution and sale of water for beneficial uses for compensation.

Ariz. Rev. Stat. Ann. § 40-202 (1975):

A. The commission may supervise and regulate every public service corporation in the state and do all things, whether specifically designated in this title or in addition thereto, necessary and convenient in the exercise of such power and jurisdiction.

B. A public service corporation shall comply with every

order, decision, rule or regulation made by the commission in any matter relating to or affecting its business as a public service corporation, and shall do everything necessary to secure compliance with and observance of every such order, decision, rule or regulation.

Ariz. Rev. Stat. Ann. § 40-203 (1975):

When the commission finds that the rates, fares, tolls, rentals, charges or classifications, or any of them, demanded or collected by any public service corporation for any service, product or commodity, or in connection therewith, or that the rules, regulations, practices or contracts, are unjust, discriminatory or preferential, illegal or insufficient, the commission shall determine and prescribe them by order, as provided in this title.

Ariz. Rev. Stat. Ann. § 40-204 (Supp. 1981):

A. Every public service corporation shall furnish to the commission, in the form and detail the commission prescribes, tabulations, computations, annual reports, monthly or periodical reports of earnings and expenses, and all other information required by it to carry into effect the provisions of this title and shall make specific answers to all questions submitted by the commission. If a corporation is unable to answer any question, it shall give a good and sufficient reason therefor.

B. When required by the commission, a public service corporation shall deliver to the commission copies of any maps, profiles, contracts, franchises, books, papers and records in its possession, or in any way relating to its property or affecting its business, and also a complete inventory of all its property in the form the commission directs.

C. No information furnished to the commission by a public service corporation, except matters specifically required to be open to public inspection, shall be open to public inspection or made public except on order of the commission, or by the

commission or a commissioner in the course of a hearing or proceeding.

D. Any officer or employee of the commission who knowingly divulges any such information is guilty of a class 2 misdemeanor.

Ariz. Rev. Stat. Ann. § 40-221 (1975):

A. The commission may establish a system of accounts to be kept by public service corporations, or classify the corporations and establish a system of accounts for each class, and prescribe the manner in which accounts shall be kept. It may prescribe the forms of accounts, records and memoranda to be kept, including the records of the movement of traffic as well as the receipts and expenditures of money, and any other records necessary to carry out the provisions of this article. The commission may prescribe the accounts in which particular outlays and receipts shall be entered, charged or credited.

B. The system of accounts established or forms prescribed shall not, in the case of corporations subject to the regulations of the interstate commerce commission, be inconsistent with the systems and forms established for the corporations by the interstate commerce commission, but the corporation commission may prescribe forms of accounts, records and memoranda covering information in addition to that required by the interstate commerce commission.

C. It shall be unlawful for any such corporation to keep any accounts, records or memoranda other than those prescribed by the commission, or those prescribed by or under the authority of any other state or of the United States, excepting such accounts, records or memoranda as shall be explanatory of and supplemental to the acconts, records or memoranda prescribed.

Ariz. Rev. Stat. Ann. § 40-241 (1975):

A. The commission, each commissioner and person employed by the commission may, at any time, inspect the

accounts, books, papers and documents of any public service corporation, and any of such persons who are authorized to administer oaths may examine under oath any officer, agent or employee of such corporation in relation to the business and affairs of the corporation.

B. Any person other than a commissioner or an officer of the commission demanding such inspection shall produce under the hand and seal of the commission his authority to make the inspection.

C. A written record of such testimony or statement given under oath shall be made and filed with the commission.

Ariz. Rev. Stat. Ann. § 40-250 (Supp. 1981):

A. No public service corporation shall raise any rate, fare, toll, rental or charge, or alter any classification, contract, practice, rule or regulation to result in any increase thereof, except upon a showing before the commission and a finding by the commission that an increase is justified. The showing before the commission by a public service corporation with gross operating revenues of less than twenty-five thousand dollars, including the requested rate relief, may be made with or without a hearing as determined by order of the commission.

B. When there is filed with the commission any schedule stating an individual or joint rate, fare, toll, rental, charge, classification, contract, practice, rule or regulation not increasing or resulting in an increase, the commission may, without answer or other pleadings by the interested corporation, but upon reasonable notice, conduct a hearing concerning the propriety of the rate, fare, toll, rental, charge, classification, contract, practice, rule or regulation, and pending the hearing and the decision thereon, it shall not go into effect. The period of suspension thereof shall not extend one hundred twenty days beyond the time when it would otherwise go into effect, unless the commission extends the period of suspension for a further period not exceeding six months.

C. On the hearing the commission shall by order establish

the rates, fare, tolls, rentals, charges, classifications, contracts, practices, rules or regulations proposed, in whole or in part, or establish others in lieu thereof, which it finds just and reasonable, and which, if not suspended shall, on the expiration of thirty days from the time of filing the order, or in such lesser time as the commission grants, become effective and be established, subject to the power of the commission to alter or modify the order.

Ariz. Rev. Stat. Ann. § 40-251 (1975):

A. For the purpose of ascertaining matters concerning the valuation or revaluation of the property of public service corporations, the commission may conduct hearings at times or places it designates. Before any hearing or supplemental or further hearing is had the commission shall give the corporation affected thereby at least thirty days written notice, specifying the time and place of the hearing, but such notice shall not prevent the commission from making any preliminary examination or investigation into such matters or from inquiring into them in any other investigation or hearing.

B. All corporations affected shall be heard and may introduce evidence at the hearing. The commission may receive evidence from other sources of information. The evidence introduced at the hearing shall be reduced to writing and certified under the seal of the commission. The commission shall make and file its finding of facts in writing upon all matters concerning which evidence is introduced which in its judgment relates to the value of the property.

C. The original or supplemental findings, so made and filed, when properly certified under seal, shall be admissible in evidence in any action, proceeding or hearing before the commission or any court in which the commission, the state, or any officer, department or institution thereof, or any county, city, municipality or other body politic, and the corporation affected, is interested, whether arising under the provisions of this article or otherwise. Such findings, when received in evidence in any action or proceeding arising under

this article, shall be conclusive evidence of the facts therein stated as of the dates therein stated under conditions then existing, and such facts may only be controverted by showing a subsequent change in conditions bearing upon the facts therein determined.

D. Findings made at supplemental hearings or investigations shall be considered in connection with and as a part of the original findings except insofar as the supplemental findings change or modify the findings made at the original hearing or investigation.

Ariz. Rev. Stat. Ann. § 40-281 (Supp. 1981):

A. A street railroad, gas, electrical, telephone, sewer or water corporation shall not begin construction of a street railroad, a line, plant, service or system, or any extension thereof, without first having obtained from the commission a certificate of public convenience and necessity.

B. This section shall not require such corporation to secure a certificate for an extension within a city, county or town within which it has lawfully commenced operations, or for an extension into territory either within or without a city, county or town, contiguous to its street railroad or line, plant or system, and not served by a public service corporation of like character, or for an extension within or to territory already served by it, necessary in the ordinary course of its business. If a public service corporation, in constructing or extending its line, plant or system, interferes or is about to interfere with the operation of the line, plant or system of any other public service corporation already constructed, the commission, on complaint of the corporation claiming to be injuriously affected, may, after hearing, make an order and prescribe terms and conditions for the location of lines, plants or systems affected as it deems just and reasonable.

C. No such corporation shall exercise any right or privilege under any franchise or permit without first having obtained from the commission a certificate of public convenience and necessity.

Ariz. Rev. Stat. Ann. § 40-284 (1975):

A. A foreign corporation, unless authorized to transact a public service business within this state, shall not transact within the state any public service business, nor transact within the state any public service business of a character different from that which it is authorized to transact.

B. A license, permit or franchise to own, control, operate or manage any public service business shall not be granted or transferred, directly or indirectly, to any foreign corporation not lawfully transacting within this state a public service business of like character, but foreign corporations engaging in commerce with foreign nations or commerce among the several states of the United States may transact within this state such commerce and intrastate commerce of a like character.

Ariz. Rev. Stat. Ann. § 40-285 (1975):

A. A railroad, street railroad, pipe line, gas, electrical, telephone, telegraph, or water corporation shall not sell, lease, assign, mortgage or otherwise dispose of or encumber the whole or any part of its railroad, line, plant, or system, necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder, nor shall such corporation merge such system or any part thereof, with any other public service corporation without first having secured from the commission an order authorizing it so to do. Every such disposition, encumbrance or merger made other than in accordance with the order of the commission authorizing it is void.

B. The approval or permit of the commission under this section shall not revive or validate any lapsed or invalid franchise or permit, or enlarge or add to the powers or privileges contained in the grant of any franchise or permit, or waive any forfeiture.

C. Nothing in this section shall prevent the sale, lease or other disposition by any such corporation of property which is not necessary or useful in the performance of its duties to

the public, and any sale of its property by such corporation shall be conclusively presumed to have been of property which is not useful or necessary in the performance of its duties to the public as to any purchaser of the property in good faith for value.

D. A public service corporation shall not purchase, acquire, take or hold, any part of the capital stock of any other public service corporation organized or existing under the laws of this state without a permit from the commission.

E. Every assignment, transfer, contract, or agreement for assignment or transfer, of any stock in violation of the provisions of this section is void, and the transfer shall not be made on the books of any public service corporation.

Ariz. Rev. Stat. Ann. § 40-286 (1975):

The provisions of title 44, chapter 10, article 1, shall not apply to any conduct or activity of a public service corporation holding a certificate of public convenience and necessity granted pursuant to this article, which conduct or activity is approved by a statute of this state or of the United States or by the corporation commission or an administrative agency of this state or of the United States having jurisdiction of the subject matter.

Ariz. Rev. Stat. Ann. § 40-301 (1975):

A. The power of public service corporations to issue stocks and stock certificates, bonds, notes and other evidences of indebtedness, and to create liens on their property located within this state is a special privilege, the right of supervision, restriction and control of which is vested in the state, and such power shall be exercised as provided by law and under rules, regulations and orders of the commission.

B. A public service corporation may issue stocks and stock certificates, bonds, notes and other evidences of indebtedness payable at periods of more than twelve months after the date thereof, only when authorized by an order of the commission.

C. The commission shall not make any order or supplemental order granting any application as provided by this article unless it finds that such issue is for lawful purposes which are within the corporate powers of the applicant, are compatible with the public interest, with sound financial practices, and with the proper performance by the applicant of service as a public service corporation and will not impair its ability to perform that service.

D. The provisions of this article shall not apply to foreign public service corporations providing communications service within this state whose physical facilities are also used in providing communications service in interstate commerce.

Ariz. Rev. Stat. Ann. § 40-302 (Supp. 1981):

A. Before a public service corporation issues stocks and stock certificates, bonds, notes and other evidences of indebtedness, it shall first secure from the commission an order authorizing such issue and stating the amount thereof, the purposes to which the issue or proceeds thereof are to be applied, and that, in the opinion of the commission, the issue is reasonably necessary or appropriate for the purposes specified in the order, pursuant to § 40-301, and that, except as otherwise permitted in the order, such purposes are not, wholly or in part, reasonably chargeable to operative expenses or to income. Before an order is issued under this section, notice of the filing of the application for such order shall be given by the commission or the applicant in such form and manner as the commission deems appropriate. The commission may hold a hearing, and make inquiry or investigation, and examine witnesses, books, papers and documents, and require filing data it deems of assistance.

B. The commission may grant or refuse permission for the issue of evidences of indebtedness or grant the permission to issue them in a lesser amount, and may attach to its permission conditions it deems reasonable and necessary. The commission may authorize issues less than, equivalent to or greater than the authorized or subscribed capital stock of the corporation, and the provisions of the general laws of the state with

reference thereto have no application to public service corporations.

C. A public service corporation shall not, without consent of the commission, apply the issue of any stock or stock certificate, bond, note or other evidence of indebtedness, or any part thereof, or any proceeds thereof, to any purpose not specified in the commission's order, or to any purpose specified in the commission's order in excess of the amount authorized for the purpose, or issue or dispose of the proceeds of such issuance on any terms less favorable than those specified in the order.

D. A public service corporation may issue notes, not exceeding seven per cent of total capitalization if operating revenues exceed two hundred fifty thousand dollars, for proper purposes and not in violation of law payable at periods of not more than twelve months after date of issuance, without consent of the commission, but no such note shall, wholly or in part, be refunded by any issue of stocks or stock certificates, bonds, notes or any other evidence of indebtedness without consent of the commission.

E. The commission may not authorize the capitalization of the corporate franchise, or of any franchise or permit whatever, or the right to own, operate or enjoy any such franchise or permit, in excess of the amount, exclusive of taxes or annual charges, actually paid to the state or to a political subdivision thereof as the consideration for the grant of the franchise, permit or right, nor shall any contract for consolidation or lease be capitalized, nor shall any public service corporation issue any bonds, notes or other evidences of indebtedness against or as a lien upon any contract for consolidation or merger.

F. The commission may require public service corporations to account for the disposition of the proceeds of all sales of stocks and stock certificates, bonds, notes and other evidences of indebtedness, in the form and detail it deems advisable, and may establish rules and regulations it deems reasonable and necessary to insure the disposition of such proceeds for the purpose specified in its order.

Ariz. Rev. Stat. Ann. § 40-323 (1975):

A. The commission may provide by rules and regulations:

1. The time within which all railroad corporations shall furnish, after demand therefor, cars, equipment and facilities necessary for handling freight in carload and less than carload lots.

2. The time within which consignors or persons ordering cars shall load them.

3. The time within which consignees to whom freight is consigned shall unload and discharge it and receive freight from freight rooms.

4. Provide penalties for failure to conform to such rules.

B. Charges for demurrage shall be uniform so that the same penalty is paid by both shipper, consignee and railroad for an equal number of cars for each day for which demurrage is charged.

C. The commission may provide the time within which express packages shall be received, gathered, transported and delivered at destination, and the limits within which express packages shall be gathered and distributed, and telegraph and telephone messages delivered, without extra charge.

D. The commission may provide the time within which baggage shall be received, transported, delivered and stored.

E. The commission may enforce reasonable regulations for weighing cars and freight offered for shipment over any line of railroad, and test the weights made by a railroad and scales used in weighing freight or cars.

Ariz. Rev. Stat. Ann. § 40-328 (1975):

Every telephone corporation and telegraph corporation operating in this state shall receive, transmit and deliver, without delay or discrimination, the conversations and messages of every other telephone or telegraph corporation with which a physical connection is made.

Ariz. Rev. Stat. Ann. § 40-329 (1975):

A. Whenever the commission finds that a physical connection can reasonably be made between the lines of two or more telephone or telegraph corporations to form a continuous line of communication, and that public convenience and necessity will be served thereby, or that two or more telegraph or telephone corporations have failed to establish joint rates, tolls or charges for service by or over their lines, and that a connection ought to be established, the commission may require that a connection and joint charges be made, except where the purpose of the connection is primarily to secure transmission of local messages or conversations between points within the same city, or town. The commission may also require that conversations be transmitted and messages transferred over such connections under rules and regulations the commission establishes.

B. If the telephone or telegraph corporations do not agree upon division of the cost of the physical connection, or the divisions of the joint charges established, the commission shall after further hearing establish the division by supplemental order.

Ariz. Rev. Stat. Ann. § 40-361 (1975):

A. Charges demanded or received by a public service corporation for any commodity or service shall be just and reasonable. Every unjust or unreasonable charge demanded or received is prohibited and unlawful.

B. Every public service corporation shall furnish and maintain such service, equipment and facilities as will promote the safety, health, comfort and convenience of its patrons, employees and the public, and as will be in all respects adequate, efficient and reasonable.

C. All rules and regulations made by a public service corporation affecting or pertaining to its charges or service to the public shall be just and reasonable.

Ariz. Rev. Stat. Ann. § 40-362 (1975):

A. The commission may investigate all existing or proposed interstate rates, fares, tolls, charges and classifications, and all rules and practices in relation thereto, for or in relation to the transportation of persons or property or the transmission of messages or conversations, where any act in relation thereto takes place within this state.

B. When the proposed or existing rates are excessive or discriminatory, or in violation of the acts of Congress, or in conflict with the orders or regulations of the interstate commerce commission, the commission may apply to the interstate commerce commission or to any court of competent jurisdiction for relief.

Ariz. Rev. Stat. Ann. § 40-367 (1975):

A. No change shall be made by any public service corporation in any rate, fare, toll, rental, charge or classification, or in any rule, regulation or contract relating to or affecting any rate, toll, fare, rental, charge, classification or service, or in any privilege or facility, except after thirty days notice to the commission and to the public as provided in this chapter.

B. Notice shall be given by filing with the commission and keeping open for public inspection new schedules stating plainly the change to be made in the schedules then in force, and the time when the change will go into effect.

C. The commission, for good cause shown, may allow changes without requiring the thirty days notice provided for in this section by an order specifying the changes so to be made and the time when they shall take effect, and the manner in which they shall be filed and published.

D. When any change is proposed attention shall be directed to the change on the schedule filed with the commission by some mark, designated by the commission, immediately preceding or following the item.

Ariz. Rev. Stat. Ann. § 40-369 (1975):

A. A telephone or telegraph corporation shall not charge or receive any greater compensation in the aggregate for transmission of a long distance message or conversation for a shorter than for a longer distance over the same line or route in the same direction within this state, the shorter being included within the longer distance, or charge any greater compensation for a through service than the aggregate of the intermediate rates or tolls subject to the provisions of this chapter. The provisions of this section shall not be construed as authorizing any such corporation to charge and receive as great a compensation for a shorter as for a longer distance service.

B. Upon application to the commission, a telephone or telegraph corporation may, in special cases after investigation, be authorized by the commission to charge less for a longer than for a shorter distance service for the transmission of messages or conversations, and the commission may from time to time prescribe the extent to which the corporation may be relieved from the operation and requirements of this section.

Del. Code Ann. tit. 26, § 121 (1974):

The Commission shall have general supervision and regulation of all public utilities and also over their property, property rights, equipment, facilities and franchises so far as may be necessary for the purpose of carrying out this title.

Del. Code Ann. tit. 26, § 122 (1974):

The Commission shall have no supervision or regulation over any public utility or over the property, property rights, equipment, facilities or franchises of any public utility that is municipally owned, except that in the case where a municipally owned public utility supplies water or electricity to nonresidents of the municipality, the rates and charges imposed on nonresident users of municipally owned water and electricity, as well as the service and the service territory of same, shall be subject to the supervision and regulation of the Commission if the rates exceed 150% of the published rates for residents inside the municipal boundaries.

Del. Code Ann. tit. 26, § 123 (1974):

The Commission may require every public utility to file with the Commission such annual and other periodical or special reports, at such times, in such form and of such content, and covering such period or periods of time as the Commission may by rules and regulations or by order prescribe. The Commission may require any such public utility to file with it a copy of any report filed by such public utility with any federal department or regulatory body. All reports shall be made under oath or affirmation unless the Commission otherwise specifies.

Del. Code Ann. tit. 26, § 124 (1974):

The Commission may investigate, upon its own initiative or upon complaint in writing, any matter concerning any public utility.

Del. Code Ann. tit. 26, § 125 (1974):

The Commission, by or through its members or duly authorized representatives, shall at all times have access to and the right to inspect and examine any and all books, accounts, records, memoranda, property, plant, facilities and equipment of public utilities. Every public utility shall furnish to the Commission, within such reasonable time as the Commission may order, any information with respect to its books, accounts, records, memoranda, property, plant, facilities, equipment, service and operations which the Commission may require in aid of any inspection, examination, inquiry, investigation or hearing or in aid of any determination of the value of its property, or any portion thereof, including copies of accounts, records, books, maps, inventories, appraisals, valuations, contracts, reports of engineers and other data, records and papers and shall grant to all authorized agents of the Commission access to its premises, property, plant, facilities and equipment and its books, accounts, records and memoranda when requested so to do.

Del. Code Ann. tit. 26, § 126 (1974):

The Commission may from time to time ascertain and determine the fair value of the property of any public utility whenever, in the judgment of the Commission, it is necessary so to do for the purpose of carrying out any of the provisions of this chapter, and, in making such valuation, the Commission may have access to and use any books, documents or records in the possession of any department or board of this State or any political subdivision thereof. In ascertaining and determining such fair value, the Commission may determine every fact, matter or thing which, in its judgment, does or may have any bearing on such value and may take into consideration, among other things, the original cost of construction, particularly with reference to the amount expended in the existing and useful permanent improvements, with such consideration for the amount in market value of its bonds and stocks, the probable earning capacity of the property under particular rates prescribed by statute or ordinance or other

municipal contract or fixed or proposed by the Commission and for the items of expenditures for obsolete equipment and construction, as the circumstances and the historical development of the enterprise may warrant, the reproduction costs of the property, based upon the fair average price of materials, property and labor and the developmental and going concern value of such public service company, and these and any other elements of value shall be given such weight by the Commission as may be just and right in each case.

Del. Code Ann. tit. 26, § 127 (1974):

The Commission may, after hearing and upon notice, by order in writing, fix just and reasonable individual rates, joint rates, charges or schedules thereof, as well as commutation, mileage and other special rates which shall be imposed, observed and followed thereafter by any public utility whenever the Commission determines any existing individual rate, joint rate, toll, charge or schedule thereof or commutation, mileage or other special rate to be unjust, unreasonable, insufficient or unjustly discriminatory or preferential.

Del. Code Ann. tit. 26, § 128 (1974):

The Commission may require every public utility to file with the Commission complete schedules of every classification employed and of every individual or joint rate, fare or charge made, charged or exacted by the public utility for any product supplied or service rendered within this State or specified in such requirement.

Del. Code Ann. tit. 26, § 129 (1974):

The Commission may, after hearing and upon notice, by order in writing, require every public utility to make, keep and preserve for such periods of time, such accounts, records of cost accounting procedures, correspondence, memoranda, papers, books and other records as the Commission may by rules and regulations or order prescribe as necessary or appropriate for purposes of the administration of this chapter.

The Commission may prescribe systems of accounts and records to be kept by public utilities or may classify public utilities and prescribe a system of accounts and records for each class and the manner and form in which such accounts and records shall be kept. The accounting system of any public utility also subject to the jurisdiction of a federal regulatory body shall correspond, as far as practicable, to the system prescribed by such federal regulatory body. The Commission may require any such public utility to keep and maintain supplemental or additional accounts to those required by any such regulatory body. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays and receipts shall be entered, charged or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be upon the public utility making, authorizing or requiring such entry, and the Commission may suspend any charge or credit pending submission of satisfactory proof in support thereof.

Del. Code Ann. tit. 26, § 130 (1974):

The Commission may, after hearing and by order in writing, require every public utility to carry a reasonable and adequate depreciation account in accordance with such rules, regulations, orders and forms of account as the Commission may prescribe. The Commission may from time to time ascertain, determine and by order fix the proper and adequate rates of depreciation of the several classes of property of each public utility or class of public utilities. Each public utility shall conform its depreciation accounts to the rates so ascertained, determined and fixed.

Del. Code Ann. tit. 26, § 131 (1974):

The Commission may, after hearing and by order in writing, fix just and reasonable standards, classifications, regulations, practices, measurements or services to be furnished, imposed, observed and followed thereafter by any public utility.

Del. Code Ann. tit. 26, § 132 (1974):

The Commission may, after hearing and by order in writing, ascertain and fix adequate and reasonable standards for the measurement of quantity, quality, pressure, initial voltage or other condition pertaining to the supply of the product or service rendered by any public utility and may prescribe reasonable regulations for examinations and test of such product or service and for the measurement thereof.

Del. Code Ann. tit. 26, § 133 (1974):

(a) The Commission may, after hearing, by order in writing, establish reasonable rules, regulations, specifications and standards to secure the accuracy of all meters and appliances for measurements and may provide for the examination and test of all appliances used for the measuring of any products or service of a public utility.

(b) The Commission may enter, by and through its agents, experts or examiners, upon any premises occupied by any public utility for the purpose of making the examination and tests provided for in this section and may set up and use on such premises any apparatus and appliances necessary therefor.

(c) The Commission may fix the fees to be paid by any consumer or user of any products or service of a public utility who may apply to the Commission for an examination or test to be made of the meters or other appliances of the utility. If the meter so tested shall be found to be accurate within such commercially reasonable limits as the Commission may by general or special order fix for such meters or class of meters, the fee shall be paid by the consumer requiring such test, but if not so found, then the cost thereof shall be borne by the public utility furnishing the meter.

Del. Code Ann. tit. 26, § 134 (1974):

The Commission may, after hearing and upon notice, by order in writing, require every public utility to comply with

the laws of this State and any ordinance of any political subdivision thereof relating thereto and to conform to the duties imposed upon it thereby or by the provisions of its own charter, whether obtained under any general or special law of any state.

Del. Code Ann. tit. 26, § 135 (1974):

The Commission may, after hearing and upon notice, by order in writing, require every public utility to furnish safe, adequate and proper service and keep and maintain its property and equipment in such condition as to enable it to do so.

Del. Code Ann. tit. 26, § 136 (1974):

The Commission may, after hearing and upon notice, by order in writing, require every public utility to establish, construct, maintain and operate any reasonable extension of its existing facilities where, in the judgment of the Commission, such extension is reasonable and practicable and will furnish sufficient business to justify the construction and maintenance of the same and when the financial condition of the public utility reasonably warrants the original expenditures required in order to make and operate such extension.

Del. Code Ann. tit. 26, § 137 (1974):

The Commission may, after hearing and upon notice, by order in writing, direct any railroad, street railway, traction company or motor bus passenger line to establish and maintain at any junction or point of connection or intersection with any other line of such company or with any line of any other railroad, street railway, traction company, motor bus, electric trackless trolley coach or passenger line, such just and reasonable connection as is necessary to promote the convenience of shippers of property or of passengers and in like manner may direct any railroad, street railway or traction company, engaged in carrying merchandise to construct, maintain and operate upon reasonable terms a switch con-

nection with any private side track which may be constructed by any shipper to connect with the railroad, street railway or traction railway where, in the judgment of the commission, such connection is reasonable and practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same.

Del. Code Ann. tit. 26, § 163 (1974):

Every public utility shall keep such books, accounts, papers, records and memoranda, as are required by the Commission, in an office within this State, and shall not remove the same or any of them from this State, except upon such terms and conditions as may be prescribed by the Commission; but this provision shall not apply to a public utility engaged in interstate commerce, whose accounts are kept at its principal place of business without this State in the manner prescribed by any federal regulatory body. Such public utility, when required by the Commission, shall furnish to the Commission, within such reasonable time as it shall fix, certified copies of its books, accounts, papers, records and memoranda, relating to the business done by such public utility within this State.

Del. Code Ann. tit. 26, § 164 (1974):

Every public utility shall file with the Commission a designation in writing of the name and post office address of a person resident within this State upon whom service of any notice, order or process may be made under this chapter. Such designation may, from time to time, be changed by like writing similarly filed.

Del. Code Ann. tit. 26, § 165 (1974):

(a) No public utility, without having first obtained the approval of the Commission, shall:

(1) Directly or indirectly merge or consolidate with any other person or company or sell, lease, assign or mortgage,

except by supplemental indenture in accordance with the terms of a mortgage outstanding September 1, 1949, or otherwise dispose of or encumber any essential part of its franchises, plant, equipment or other property, necessary or useful in the performance of its duty to the public; or

(2) Issue any stocks, stock certificates or notes, bonds or other evidences of indebtedness payable in more than 1 year from the date thereof; or

(3) Assume any obligation or liability as guarantor, endorser, surety or otherwise in respect of any security of any other person or corporation, payable or maturing more than 1 year after the date of such issue or assumption of liability.

(b) Application for any such approval or authorization shall be made to the Commission in writing, verified by oath or affirmation, and shall be in such form and contain such information as the Commission requires.

(c) The Commission shall approve of any such proposed merger, mortgage, transfer, issue or assumption when it finds that the same is to be made in accordance with law for a proper purpose and is consistent with the public interest. The Commission may make such investigation and hold such hearings in the matter as it deems necessary and thereafter may grant any application under this section in whole or in part and with such modification and upon such terms and conditions as it deems necessary or appropriate. The Commission shall grant, modify, refuse or prescribe appropriate terms and conditions with respect to every such application or proposed merger, mortgage, transfer, issue or assumption, within 30 days after the filing of the application therefor; and, in the absence of any such action within such period of time, any such proposed merger, mortgage, transfer, issue or assumption shall be deemed to be approved.

(d) The provisions of this section relating to the issuance of securities shall not apply to securities of railroad companies subject to the jurisdiction of the Interstate Commerce Commission.

(e) Nothing contained in this section shall be construed to

prevent the sale or lease or other disposition by any public utility of any of its property in the ordinary course of its business.

Del. Code Ann. tit. 26, § 166 (1974):

(a) This chapter shall not prevent the issuance by any street or traction railway, motor bus, electric trackless trolley coach, telephone or telegraph companies or by any other public utility of free passes or franks to their employees, officers, agents, surgeons, physicians, attorneys-at-law and their families and the interchange between public utilities and common carriers of passes or franks for their employees, officers, agents, surgeons, physicians, attorneys-at-law and their families nor to prevent the carrying without fare upon electric trackless trolley coaches, street railways or buses, of policemen, firemen, health officers and park guards in uniform or plain clothes detectives, sheriffs, deputy sheriffs, employees of the Department of Public Works of the City of Wilmington and other public employees wearing official badges.

Del. Code Ann. tit. 26, § 901 (1974):

(a) Any telegraph corporation, any telephone corporation or any corporation using lines or wires for the transmitting of electrical current, whether created by prior special act or organized under Chapter 1 of Title 8, may erect, construct and maintain its telegraph or telephone lines or its wires for transmitting electrical current and the necessary fixtures for the same through and across or under any of the canals and canal lands, rivers or other waters and also along any highways within the limits of this State, outside of highways within the limits of and maintained by incorporated cities and towns, subject to the approval or authority of the public authority having charge or control of such highways and also subject to the right of the owners of the fee on such highways and to the owners abutting upon such highways to full compensation to the extent that their property is taken or burdened.

(b) Whenever any such corporation cannot agree with any

such owner as to purchase or damages, the corporation may proceed for the condemnation of any such franchises, easements, canals, canal lands, rivers or other waters or highways or burdens imposed upon landowners abutting upon any highways whether owners of the fee in the bed of such highways or not in manner prescribed by Chapter 61 of Title 10.

(c) All new extensions within a subdivision of electric distribution, telephone, and telegraph lines applied for after July 7, 1970 and necessary to furnish permanent service to new residential buildings in a subdivision having 5 or more building lots or to new multi-occupancy buildings, shall be placed underground, except in situations where the Public Service Commission of Delaware determines that the placing of such utility lines underground is not feasible from an economic, engineering or physical standpoint. Such extension of service shall be made by the utility in accordance with its rules and regulations which must be approved by the Delaware Public Service Commission.

Del. Code Ann. tit. 26, § 902 (1974):

Any telegraph or telephone corporation organized under Chapter 1 of Title 8, in addition to the powers conferred upon corporations generally, may occupy and use the public streets, roads, lanes, alleys, avenues, turnpikes and waterways within this State, or elsewhere, if it extends its lines and business, for the erection of poles and wires or cable or underground conduits, portions of which they may lease, rent or hire to other like companies. Before entering upon any street, road, lane, alley, avenue, turnpike or waterway the consent of the authorities having jurisdiction thereof shall have first been obtained and the same shall be used and occupied under such rules and regulations as are prescribed by such authorities. The portions of the surfaces of the streets, avenues or alleys disturbed in laying the wires, cables or underground conduits shall be immediately restored to their original condition and any pavements which are removed for the purpose of laying or repairing the wires, cables or underground conduits, shall

be restored to as good condition as they were previous thereto and so mainained for 6 months after the completion of the work. In case of failure on the part of the corporation to so restore and maintain the same, the proper authorities having supervision of the streets, avenues and alleys may properly restore and maintain the same and the cost thereof may be recovered by the city, town or district from the corporation in any court of competent jurisdiction. All posts or poles which are erected by authority conferred by this section shall be so located as in no way to interfere with the safety or convenience of persons traveling on or over the roads and highways. All wires fastened upon posts or poles so erected shall be placed at the height of not less than 20 feet above all road crossings and 23 feet above railroad crossings. No posts or poles shall be erected upon the soil or property of any person without first obtaining the written consent of the owner thereof.

Del. Code Ann. tit. 26, § 903 (1974):

Any telegraph or telephone corporation of this State, whether created by prior special act or under Chapter 1 of Title 8, may consolidate with any other telegraph or telephone company incorporated under the laws of this State, or any other state, or of the United States, whose telegraph or telephone lines, within or without this State, connect or form continuous lines with the telegraph or telephone lines of the company so consolidated, subject to the provisions of Chapter 1 of this title. Such consolidation shall be made in the manner and by the proceedings prescribed in Chapter 1 of Title 8.

The corporation created thereby shall be possessed of, exercise and enjoy all the rights, powers and privileges which Chapter 1 of Title 8 confers upon consolidated companies. It shall likewise be possessed of and exercise and enjoy all the franchises, rights, powers, privileges, immunities and benefits which any corporation of this State, constituent thereof, was possessed of or entitled to exercise under its charter or any law of this State. It shall be subject within this State to the conditions and restrictions imposed by its charter on any corporation of this State, constituent thereof.

Del. Code Ann. tit. 26, § 904 (1974):

(a) No person or corporation operating, controlling or owning any telephone lines within this State known as party lines and for which the regular charge for separate telephones is at the rate of $20 or more per year shall have more than 8 telephones upon any 1 line.

(b) Whoever violates subsection (a) of this section shall be fined not less than $25 nor more than $100 for each offense.

Del. Code Ann. tit. 26, § 905 (1974):

Telegraph wires shall be attached to the poles at least 12 feet above the ground except where they enter a house. If any agent of a telegraph company having supervision of the line suffers this provision to be violated for 10 days after notice by mail directed to him at the post office nearest his residence, he shall forfeit and pay $20 to anyone who will sue for the same.

Del. Code Ann. tit. 26, § 906 (1974):

Every corporation organized under Chapter 1 of Title 8 for the purpose of constructing, maintaining and operating works for the supply and distribution of electricity for electric lights, heat or power, in addition to the powers conferred upon corporations generally, may use the public roads, highways, streets, avenues and alleys in this State for the purpose of erecting posts or poles on the same to sustain the necessary wires and fixtures. The consent of the council, town commissioners or other persons having control over the public roads, highways, streets, avenues and alleys of the city, town and district in or upon which the posts or poles are to be erected shall first, and as a condition precedent, be obtained. No posts or poles shall be erected in any street of any city or incorporated town except in those streets which are designated by the authorities thereof and then only in such place and manner as is thus designated, and the same shall be so located as in no way to interfere with the safety or convenience of persons traveling on or over the streets, highways and

roads. The use of the public streets in any of the cities and incorporated towns of this State shall be subject to such regulations and taxation as may be first imposed by the corporate authorities of such cities and towns. No posts or poles shall be erected upon the soil or property of any person without first obtaining the consent in writing of the owner of the soil or property. Any wire crossing a railroad shall not be at a less elevation than 23 feet.

Del. Code Ann. tit. 26, § 907 (1974):

Every corporation mentioned in § 906 of this title may lay pipes, conduits or wires beneath the public roads, highways, streets, avenues and alleys as it deems necessary. The pipes, conduits and wires shall be laid at least 2 feet below the surface of the same and shall not in any way unnecessarily obstruct or interfere with public travel or damage public or private property. No public streets shall be opened for such purpose without the consent of the counsel of any city, or the town commissioners of any incorporated town, or other persons having control over the public roads, highways, streets, avenues and alleys. Such use of the public streets in any of the cities and towns of this State shall be subject to such regulations, taxation and restrictions as may be first imposed by the corporate authorities of such cities and towns.

Ill. Rev. Stat. ch. 111 2/3, § 1 (1979):

There is created an Illinois Commerce Commission consisting of 5 members not more than 3 of whom shall be members of the same political party at the time of appointment. The Governor shall appoint the members of such Commission by and with the advice and consent of the Senate. In case of a vacancy in such office during the recess of the Senate the Governor shall make a temporary appointment until the next meeting of the Senate, when he shall nominate some person to fill such office; and any person so nominated who is confirmed by the Senate, shall hold his office during the remainder of the term and until his successor shall be appointed and qualified. Each member of the commission shall hold office for a term of 5 years from the third Monday in January of the year in which his predecessor's term expires. Each member shall serve until his successor is appointed and qualified. The Governor shall from time to time designate the member of the commission who shall be its chairman.

The Chairman of the Commission, in order that the Commission may perform the duties and exercise the powers granted to it and assume its responsibilities, under this Act and any and all other statutes of this State, may organize the Commission and the staff thereof, into such departments, bureaus, sections or divisions as he may deem appropriate, and in connection therewith the Chairman may delegate and assign to one or more Commissioners, staff members or member, the supervision and direction of any such department, bureau, section or division.

A majority of the Commission shall constitute a quorum to transact business, but no vacancy shall impair the right of the remaining commissioners to exercise all of the powers of the Commission; and every finding, order or decision approved by a majority of the members of the Commission shall be deemed to be the finding, order or decision of the Commission.

Ill. Rev. Stat. ch. 111 2/3, § 8a (1979):

(1) The Commission shall have jurisdiction over holders of the voting capital stock of all public utilities under the jurisdiction of the Commission to such extent as may be necessary to enable the Commission to require the disclosure of the identity in respective interests of every owner of any substantial interest in such voting capital stocks. One per centum or more is a substantial interest, within the meaning of this subdivision.

(2) The Commission shall have jurisdiction over affiliated interests having transactions, other than ownership of stock and receipt of dividends thereon, with public utilities under the jurisdiction of the Commission, to the extent of access to all accounts and records of such affiliated interests relating to such transactions, including access to accounts and records of joint or general expenses, any portion of which may be applicable to such transactions; and to the extent of authority to require such reports with respect to such transactions to be submitted by such affiliated interests, as the Commission may prescribe. For the purpose of this section, the phrase "affiliated interests" means:

(a) Every corporation and person owning or holding, directly or indirectly, ten per centum or more of the voting capital stock of such public utility;

(b) Every corporation and person in any chain of successive ownership of ten per centum or more of voting capital stock;

(c) Every corporation, ten per centum or more of whose voting capital stock is owned by any person or corporation owning ten per centum or more of the voting capital stock of such public utility, or by any person or corporation in any such chain of successive ownership of ten per centum or more of voting capital stock;

(d) Every corporation, ten per centumn or more of whose voting securities is owned, directly or indirectly by such public utility;

(e) Every person who is an elective officer or director of such public utility or of any corporation in any chain of

successive ownership of ten per centum or more of voting capital stock;

(f) Every corporation which has one or more elective officers or one or more directors in common with such public utility;

(g) Every corporation or person which the Commission may determine as a matter of fact after investigation and hearing is actually exercising any substantial influence over the policies and actions of such public utility even though such influence is not based upon stock holding, stockholders, directors or officers to the extent specified in this section.

(h) Every person or corporation who or which the Commission may determine as a matter of fact after investigation and hearing is actually exercising such substantial influence over the policies and actions of such public utility in conjunction with one or more other corporations or persons with which or whom they are related by ownership or blood relationship or by action in concert that together they are affiliated with such public utility within the meaning of this section even though no one of them alone is so affiliated.

Provided, however, that no such person or corporation shall be considered as affiliated within the meaning of this section if such person or corporation is otherwise subject to the jurisdiction of the Commission or such person or corporation shall not have had transactions or dealings other than the holding of stock and the receipt of dividends thereon with such public utility during the two-year period next preceding.

(3) No management, construction, engineering, supply, financial or similar contract and no contract or arrangement for the purchase, sale, lease or exchange of any property or for the furnishing of any service, property or thing, hereafter made with any affiliated interest, as hereinbefore defined, shall be effective unless it shall first have been filed with and consented to by the Commission. Provided, however, that the Commission shall have authority to condition such approval in such manner as it may deem necessary to safeguard the public interest. If it be found by the Commission, after investigation and a hearing, that any such contract is not in

the public interest, the Commission is hereby authorized to disapprove such contract. Every contract or arrangement not consented to or excepted by the Commission as provided for in this section shall be void.

The consent to any contract or arrangement as required above, shall not constitute approval of payments thereunder for the purpose of computing expense of operation in any rate proceeding.

(4) The Commission shall have authority by general rules applicable to all public utilities affected thereby to waive the filing and necessity for approval of contracts and arrangements described in subparagraph (3) of this section in cases of (a) contracts or arrangements made in the ordinary course of business for the employment of officers or employees; (b) contracts or arrangements made in the ordinary course of business for the purchase of services, supplies, or other personal property at prices not exceeding the standard or prevailing market prices, or at prices or rates fixed pursuant to law; (c) contracts or arrangements where the total obligation to be incurred thereunder shall not be in excess of five hundred dollars ($500); (d) the temporary leasing, lending or interchanging of equipment in the ordinary course of business or in case of an emergency; and (e) contracts made by a public utility with a person or corporation whose bid is the most favorable to the public utility, as ascertained by competitive bidding under such rules as may be prescribed by the Commission. Provided, however, that if the Commission, after a hearing, finds that any public utility is abusing or has abused such general rule and thereby is evading compliance with the standard established herein, the Commission shall have power to require such public utility to thereafter file and receive the Commission's approval upon all such transactions, but said general rule shall remain in full force and effect as to all other public utilities.

Ill. Rev. Stat. ch. 111 2/3, § 9 (1979):

Every public utility shall furnish to the Commission all information required by it to carry into effect the provisions

of this Act, and shall make specific answers to all questions submitted by the Commission.

Any public utility receiving from the Commission any blanks with directions to fill the same, shall cause the same to be properly filled out so as to answer fully and correctly each question therein propounded, and in case it is unable to answer any question, it shall give a good and sufficient reason for such failure; and said answer shall be verified under oath by the president, secretary, superintendent or general manager of such public utility and returned to the Commission at its office within the period fixed by the Commission.

Whenever required by the Commission, every public utility shall deliver to the Commission, any or all maps, profiles, reports, documents, books, accounts, papers and records in its possession, or in any way relating to its property or affecting its business, and inventories of its property, in such form as the Commission may direct, or verified copies of any or all of the same.

Every public utility shall obey and comply with each and every requirement of every order, decision, direction, rule or regulation made or prescribed by the Commission in the matters herein specified, or any other matter in any way relating to or affecting its business as a public utility, and shall do everything necessary or proper in order to secure compliance with and observance of every such order, decision, direction, rule or regulation by all of its officers, agents and employees.

Ill. Rev. Stat. ch. 111 2/3, § 10.3 (Supp. 1982):

"Public utility" means and includes every corporation, company, association, joint stock company or association, firm, partnership or individual, their lessees, trustees, or receivers appointed by any court whatsoever that owns, controls, operates or manages, within this State, directly or indirectly, for public use, any plant, equipment or property used or to be used for or in connection with, or owns or controls any franchise, license, permit or right to engage in:

a. the transportation of persons or property;

b. the transmission of telegraph or telephone messages between points within this State;

c. the production, storage, transmisson, sale, delivery or furnishing of heat, cold, light, power, electricity or water;

d. the disposal of sewerage; or

e. the conveyance of oil or gas by pipe line.

"Public utility" does not include, however:

1. public utilities that are owned and operated by any political subdivision, public institution of higher education or municipal corporation of this State, or public utilities that are owned by such political subdivision, public institution of higher education, or municipal corporation and operated by any of its lessees or operating agents;

2. telephone companies which are purely mutual concerns, having no rates or charges for services, but paying the operating expenses by assessment upon the members of such a company and no other person but does include telephone cooperatives as defined in Section 10-20;

3. water companies which are purely mutual concerns, having no rates or charges for services, but paying the operating expenses by assessment upon the members of such a company and no other person;

4. electric cooperatives as defined in Section 10.19;

5. such public utilities which are engaged in the transportation of persons by motor bus to the extent that the transportation is conducted pursuant to a valid and subsisting contract with a political subdivision or a municipal corporation in this State but any such public utility is subject to this Act to the extent that it owns, controls, operates or manages within this State, directly or indirectly, for public use, any plant, equipment or property used or to be used for or in connection with the transportation of persons, which transportation is not provided pursuant to a valid and subsisting contract with a political subdivision or a municipal corporation

of this State and is subject to Sections 55a and 55b of this Act in all events whether it has such a contract or not; and

6. sewage disposal companies which provide sewage disposal services on a mutual basis without establishing rates or charges for services, but paying the operating expenses by assessment upon the members of the company and no others.

7. The transportation of persons or property by:

(i) air;

(ii) commuter vans as defined by Section 1-114.1 of The Illinois Vehicle Code;

(iii) motor vehicles regulated by "The Illinois Motor Carrier of Property Law";

(iv) motor vehicles regulated by "The Illinois Commercial Relocation of Trespassing Vehicle Law";

(v) motor vehicles transporting passengers to destinations without following any regular or fixed schedule or route, charging upon a time or distance basis, including taxicabs and charter or contract motor buses;

(vi) motor vehicles engaged in ridesharing arrangement, as defined in Section 1-176.1 of The Illinois Vehicle Code;

(vii) motor vehicles maintained or operated for the conveyance of the sick or injured in emergency situations; and

(viii) motor vehicles maintained or operated for the conveyance of nonambulatory, handicapped, invalid, and convalescent persons on a nonemergency basis.

Ill. Rev. Stat. ch. 111 2/3, § 29 (Supp. 1982):

No franchise, license, permit or right to own, operate, manage or control any public utility shall be assigned, transferred or leased nor shall any contract or agreement with reference to or affecting any such franchise, license, permit or right be valid or of any force or effect whatsoever, unless such assignment, lease, contract, or agreement shall have been approved by the Commission. Such permission shall not be construed to revive or validate any lapsed or invalid franchise, license, permit or right, or to enlarge or add to

the powers and privileges contained in the grant of any franchise, license, permit or right, or to waive any forfeiture.

The provisions of this Section shall not apply to any transactions by or with a political subdivision or municipal corporation organized under the laws of this State.

Ill. Rev. Stat. ch. 111 2/3, § 38 (Supp. 1982):

No public utility shall, as to rates or other charges, services, facilities or in other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates or other charges, services, facilities, or in any other respect, either as between localities or as between classes of service.

Prior to October 1, 1984, no public utility providing electrical or gas service shall consider the use of solar energy by a customer as a basis for establishing higher rates or charges for any service or commodity sold to such customer; nor shall a public utility subject any customer utilizing solar energy to any other prejudice or disadvantage on account of such use.

The Commission, in order to expedite the determination of rate questions, or to avoid unnecessary and unreasonable expense, or to avoid unjust or unreasonable discrimination between classes of customers, or, whenever in the judgment of the Commission public interest so requires, may; except in the case of telephone companies, for rate making and accounting purposes, or either of them, consider one or more municipalities either with or without the adjacent or intervening rural territory as a regional unit where the same public utility serves such region under substantially similar conditions, and may within such region prescribe uniform rates for consumers or patrons of the same class.

Every public utility shall, upon reasonable notice, furnish to all persons who may apply therefor and be reasonably entitled thereto, suitable facilities and service, without discrimination and without delay.

Ill. Rev. Stat. ch. 111 2/3, § 41 (Supp. 1982):

Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that the rates or other charges, or classifications, or any of them, demanded, observed, charged or collected by any public utility for any service or product or commodity, or in connection therewith, including the rates or fares for excursion or commutation tickets, or that the rules, regulations, contracts, or practices or any of them, affecting such rates or other charges, or classifications, or any of them, are unjust, unreasonable, discriminatory or preferential, or in any wise in violation of any provisions of law, or that such rates or other charges or classifications are insufficient, the Commission shall determine the just, reasonable or sufficient rates or other charges, classifications, rules, regulations, contracts or practices to be thereafter observed and in force, and shall fix the same by order as hereinafter provided. However, it shall be proper for the Commission to consider as an operating expense, for the purpose of determining whether a rate or other charge or classification is sufficient, donations made by a public utility for the public welfare or for charitable, scientific, religious or educational purposes, provided that such donations are reasonable in amount.

The Commission shall have power, upon a hearing, had upon its own motion or upon complaint, to investigate a single rate or other charge, classification, rule, regulation, contract or practice, or any number thereof, or the entire schedule or schedules of rates or other charges, classifications, rules, regulations, contracts and practices, or any thereof of any public utility, and to establish new rates or other charges, classifications, rules, regulations, contracts or practices or schedule or schedules, in lieu thereof.

Ill. Rev. Stat. ch. 111 2/3, § 47 (1979):

Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall determine that public convenience and necessity require a physical connection for the establishment of a continuous line of communication

between any two or more public utilities for the conveyance of messages or conversations, the Commission may by order, require that such connection be made. If such public utilities do not agree upon the division between them of the cost of such physical connection or connections, the Commission shall have authority after further hearing, to establish such division by supplemental order.

Ill. Rev. Stat. ch. 111 2/3, § 49a (Supp. 1982):

Except as provided in Section 49b,[1] no public utility shall abandon or discontinue any service without first having secured the approval of the commission, except in case of assignment, transfer, lease or sale of the whole or any part of its franchises, licenses, permits, plant, equipment, business, or other property to any political subdivision or municipal corporation of this State. In granting its approval, the commission may impose such terms, conditions or requirements as in its judgment are necessary to protect the public interest. Provided, however, that any public utility abandoning or discontinuing service in pursuance of authority granted by the commission shall be deemed to have waived any and all objections to the terms, conditions or requirements imposed by the commission in that regard. Provided, further, that nothing in this section shall be construed to limit the right of a public utility to discontinue service to individual patrons in accordance with the effective rules, regulations, and practices of such public utility.

The commission, after a hearing upon its own motion or upon petition of any public utility, shall have power by order to authorize or require any public utility to curtail or discontinue service to individual customers or classes thereof, or for specific purposes or uses, and otherwise to regulate the furnishing of service, provided that preference for service shall be given to those customers serving essential human needs and governmental agencies performing law enforcement functions, whenever and to the extent such action is required by the convenience and necessity of the public during time

[1] Section 49b of this chapter.

of war, invasion, insurrection or martial law, or by reason of a catastrophe, emergency, or shortage of fuel, supplies or equipment employed or service furnished by such public utility; provided, however, that an interim order, effective for a period not exceeding 15 days, may be made without a hearing if the circumstances do not reasonably permit the holding of a hearing. Orders for the curtailment or discontinuance of service pursuant to this paragraph shall not be continued in effect for any period beyond that which is reasonably necessary, shall be vacated by the commission as soon as public convenience and necessity permit, and shall include such arrangements for substitute service in the interim as the commission in its judgment may impose. Every such order, during the period it is in effect and for such further period, if any, as the commission may provide, shall have the effect of suspending the operation of all prior orders or parts of orders of the commission inconsistent therewith. No public utility shall be held liable for any damage resulting from any action taken, or any omission to act, pursuant to or in compliance with any order under this paragraph for the curtailment or discontinuance of service unless such order was procured by the fraud of the public utility.

Ill. Rev. Stat. ch. 111 2/3, § 52 (1979):

No public utility shall begin the construction of any new plant, equipment, property or facility which is not in substitution of any existing plant, equipment, property or facility or in extension thereof or in addition thereto, unless and until it shall have obtained from the Commission a certificate that public convenience and necessity require such construction.

No public utility not owning any city or village franchise nor engaged in performing any public service or in furnishing any product or commodity within this State and not possessing a certificate of public convenience and necessity from the State Public Utilities Commission or the Public Utilities Commission, at the time this Act goes into effect shall transact any business in this State until it shall have obtained a certificate from the Commission that public convenience and necessity require the transaction of such business.

Whenever after a hearing the Commission determines that any new construction or the transaction of any business by a public utility will promote the public convenience and is necessary thereto, it shall have the power to issue certificates of public convenience and necessity. The Commission may issue a temporary certificate which shall remain in force not to exceed one year in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

A public utility shall not be required to obtain but may apply for and obtain a certificate of public convenience and necessity pursuant to this section with respect to any matter as to which it has received the authorization or order of the Commission under the Electric Suppliers Act and any such authorization or order granted a public utility by the Commission under that Act shall as between public utilities be deemed to be and shall have except as provided in that Act the same force and effect as, a certificate of public convenience and necessity issued pursuant to this Section.

No electric cooperative shall be made or shall become a party to or shall be entitled to be heard or to otherwise appear or participate in any proceeding initiated under this Section for authorization of power plant construction and as to matters as to which a remedy is available under the Electric Supplier Act.

Such certificates may be altered or modified by the Commission, upon its own motion or upon application by the person or corporation affected. Unless exercised within a period of two years from the grant thereof, authority conferred by a certificate of convenience and necessity issued by the Commission shall be null and void.

No certificate of public convenience and necessity shall be construed as granting a monopoly or an exclusive privilege, immunity or franchise.

Ky. Rev. Stat. Ann. § 278.010 (1969):

(1) "Corporation" includes private, quasi-public and public corporations, and all boards, agencies and instrumentalities thereof, associations, joint-stock companies and business trusts;

(2) "Person" includes natural persons, partnerships, corporations, and two or more persons having a joint or common interest;

(3) The unmodified term "utility" means any person except a city who owns, controls, operates or manages an energy utility or a non-energy utility;

(4) "Energy utility" means any person except a city who owns, controls, operates or manages any facility used or to be used for or in connection with:

(a) The generation, production, transmission or distribution of electricity to or for the public, for compensation, for lights, heat, power or other uses;

(b) The production, manufacture, storage, distribution, sale or furnishing of natural or manufactured gas, or a mixture of same, to or for the public for compensation, for light, heat, power or other uses; or

(c) The transporting or conveying of gas, crude oil or other fluid substance by pipeline to or for the public, for compensation;

(5) "Non-energy utility" means any person except a city who owns, controls, operates or manages any facility used or to be used for or in connection with:

(a) The diverting, developing, pumping, impounding, distributing or furnishing of water to or for the public, for compensation;

(b) The transmission or conveyance over wire, in air or otherwise, of any message by telephone or telegraph for the public, for compensation; or

(c) The treatment of sewage for the public, for compensation, if the facility is a subdivision treatment facility

plant, located in a county containing a city of the first class or a sewage treatment facility located in any other county and is not subject to regulation by a metropolitan sewer district;

(6) "Retail electric supplier" means any person, firm, corporation, association or cooperative corporation, excluding municipal corporations, engaged in the furnishing of retail electric service;

(7) "Certified territory" shall mean the areas as certified by and pursuant to KRS 278.017;

(8) "Existing distribution line" shall mean an electric line which on June 16, 1972, is being or has been substantially used to supply retail electric service and includes all lines from the distribution substation to the electric consuming facility but does not include any transmission facilities used primarily to transfer energy in bulk;

(9) "Retail electric service" means electric service furnished to a consumer for ultimate consumption, but does not include wholesale electric energy furnished by an electric supplier to another electric supplier for resale;

(10) "Electric-consuming facilities" means everything that utilizes electric energy from a central station source;

(11) "Facility" includes all property, means and instrumentalities owned, operated, leased, licensed, used, furnished or supplied for, by, or in connection with the business of any utility;

(12) "Rate" means any individual or joint fare, toll, charge, rental or other compensation for service rendered or to be rendered by any utility, and any rule, regulation, practice, act, requirement or privilege in any way relating to such fare, toll, charge, rental or other compensation, and any schedule or tariff or part of a schedule or tariff thereof;

(13) "Service" includes any practice or requirement in any way relating to the service of any utility, including the voltage of electricity, the heat units and pressure of gas, the purity, pressure and quantity of water, and in general the quality,

quantity and pressure of any commodity or product used or to be used for or in connection with the business of any utility;

(14) "Adequate service" means having sufficient capacity to meet the maximum estimated requirements of the customer to be served during the year following the commencement of permanent service and to meet the maximum estimated requirements of other actual customers to be supplied from the same lines or facilities during such year and to assure such customers of reasonable continuity of service;

(15) "Energy commission" means the energy regulatory commission;

(16) "Utility commission" means the utility regulatory commission;

(17) The unmodified term "commissions" means both the energy commission and the utility commission. The unmodified term "commission" means the commission with regulatory jurisdiction over the affected utility, as provided in this chapter;

(18) "Commissioner" means a member of either the energy commission or the utility commission.

Ky. Rev. Stat. Ann. § 278.020 (1969)

(1) No person, partnership, public or private corporation or combination thereof shall begin the construction of any plant, equipment, property or facility for furnishing to the public any of the services enumerated in KRS 278.010, except retail electric suppliers for service connections to electric-consuming facilities located within its certified territory and ordinary extensions of existing systems in the usual course of business, until such person has obtained from the appropriate commission a certificate that public convenience and necessity require such construction. Upon the filing of an application for such a certificate, and after a public hearing of all parties interested, the commission may issue or refuse to issue the certificate, or issue it in part and refuse it in part. Unless exercised within one (1) year from the grant

thereof, exclusive of any delay due to the order of any court or failure to obtain any necessary grant or consent, the authority conferred by the issuance of the certificate of convenience and necessity shall be void, but the beginning of any new construction or facility in good faith within the time prescribed by the commission and the prosecution thereof with reasonable diligence shall constitute an exercise of authority under the certificate.

(2) No utility shall exercise any right or privilege under any franchise or permit, after the exercise of that right or privilege has been voluntarily suspended or discontinued for more than one (1) year, without first obtaining from the commission, in the manner provided in subsection (1) of this section, a certificate of convenience and necessity authorizing the exercise of that right or privilege.

(3) No utility shall apply for or obtain any franchise, license or permit from any city or other governmental agency until it has obtained from the commission, in the manner provided in subsection (1) of this section, a certificate of convenience and necessity showing that there is a demand and need for the service sought to be rendered.

(4) All carriers or conveyors of electricity or electric power are declared to be common carriers and subject to the obligations incident thereto.

Ky. Rev. Stat. Ann. § 278.040 (1969):

(1) The energey regulatory commission shall regulate energy utilities as defined in KRS 278.010(4) and enforce the provisions of this chapter with respect to such energy utilities. The utility regulatory commission shall regulate non-energy utilities as defined in KRS 278.010(5), and enforce the provisions of this chapter with respect to such non-energy utilities. Each commission shall be a body corporate, with power to sue and be sued in its corporate name. Each commission may adopt a seal bearing its name, which seal shall be affixed to all writs and official documents, and to such other instruments as such commission directs, and all courts shall take judicial notice of the seal.

(2) The jurisdiction of the commissions shall extend to all utilities in this state. The energy regulatory commission shall have exclusive jurisdiction over the regulation of rates and service of all energy utilities and the utility regulatory commission shall have exclusive jurisdiction over the regulation of rates and service of all non-energy utilities. If a utility which is an energy utility also renders service as a non-energy utility, it shall be regulated by the energy commission with respect to all of its rates and services. Provided however, that nothing in this chapter is intended to limit or restrict the police jurisdiction, contract right or powers of cities or political subdivisions.

(3) The commissions may adopt, in keeping with KRS Chapter 13, reasonable regulations to implement the provisions of KRS Chapter 278 and investigate the methods and practices of the utilities subject to their respective jurisdictions to require them to conform to the laws of this state, and to all reasonable rules, regulations and orders of the commissions not contrary to law.

Ky. Rev. Stat. Ann. § 278.160 (1969):

(1) Under rules prescribed by the commissions, each utility shall file with the appropriate commission, within such time and in such form as the commission designates, schedules showing all rates established by it and collected or enforced. The utility shall keep copies of its schedules open to public inspection under such rules as the commission prescribes.

(2) No utility shall charge, demand, collect or receive from any person a greater or less compensation for any service rendered or to be rendered than that prescribed in its filed schedules, and no person shall receive any service from any utility for a compensation greater or less than that prescribed in such schedules.

Ky. Rev. Stat. Ann. § 278.290 (1969):

(1) Subject to the provisions of subsection (2) of this section, either commission may ascertain and fix the value of the

whole or any part of the property of any utility subject to its jurisdiction in so far as the value is material to the exercise of the jurisdiction of the commission, and may make revaluations from time to time and ascertain the value of all new construction, extensions and additions to the property of the utility. In fixing the value of any property under this subsection, the commission shall give due consideration to the history and development of the utility of its property, original cost, cost of reproduction as a going concern, capital structure, and other elements of value recognized by the law of the land for rate-making purposes.

(2) The commission shall not value or revalue the property of any utility unless the valuation or revaluation is necessary or advisable in order to determine the legality or reasonableness of any rate or service or of the issuance of securities, and then only after an investigation affecting the rate, service or securities has been instituted by the commission upon complaint or application or upon its own motion, and a hearing has been held on reasonable notice.

(3) In any rate investigation where the utility serves two (2) or more municipalities, the commission may, in computing the rate of return on the property used and useful, take as the base for the computation the valuation of the system as a whole, but may make a differential in the case of an individual municipality in proportion to the increased cost of service, if the utility can show that such a differential should be allowed.

Ky. Rev. Stat. Ann. § 278.300 (1969):

(1) No utility shall issue any securities or evidences of indebtedness, or assume any obligation or liability in respect to the securities or evidences of indebtedness of any other person until it has been authorized so to do by order of the appropriate commission.

(2) Application for authority to issue or assume securities or evidences of indebtedness shall be made in such form as the commission prescribes. Every such application shall be

made under oath, and shall be signed and filed on behalf of the utility by its president, or by a vice president, auditor, comptroller or other executive officer having knowledge of the matters set forth and duly designated by the utility. Every such application shall be placed at the head of the docket of the commission and disposed of promptly within sixty days after it is filed with the commission, unless it is necessary for good cause to continue the application for longer time than sixty days, in which case the order making the continuance shall state fully the facts that make it necessary.

(3) The commission shall not approve any issue or assumption unless, after investigation of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability, the commission finds that the issue or assumption is for some lawful object within the corporate purposes of the utility, is necessary or appropriate for or consistent with the proper performance by the utility of its service to the public and will not impair its ability to perform that service, and is reasonably necessary and appropriate for such purposes.

(4) The commission may grant or deny the application in whole or in part, or may grant it with such modifications and upon such terms and conditions as the commission deems necessary or appropriate. The order of the commission shall specify that the securities or evidences of indebtedness, or the proceeds thereof, shall be used only for the lawful purposes specified in the application, and both the application of the utility and the order of the commission shall state in general terms the purpose of the issuance or assumption.

(5) A copy of any order made and entered by the commission under this section, duly certified by the secretary of the commission, shall be sufficient evidence for all purposes of full and complete compliance by the utility with all procedural and other matters required precedent to the entry of the order.

(6) Securities and evidences of indebtedness issued and obligations and liabilities assumed by a utility, for which, under the provisions of this section, the authorization of the

commission is required, shall comply with the terms and conditions of the order of authorization entered prior to the issue or assumption, and where the order has been fully complied with the validity of the issue or assumption shall not be affected by a failure to comply with any provision of this section or rule of the commission relating to procedure or other matters preceding the entry of the order of authorization or order supplemental thereto.

(7) The commission may require periodical or special reports from the utility issuing any security or evidence of indebtedness. The report shall show, in such detail as the commission requires, the disposition made of such securities or evidences of indebtedness, and the application of the proceeds thereof.

(8) This section does not apply to notes issued by a utility, for proper purposes and not in violation of law, that are payable at periods of not more than two years from the date thereof, or to like notes, payable at a period of not more than two years from date thereof, that are issued to pay or refund in whole or in part any such notes, or to renewals of such notes from time to time, not exceeding in the aggregate six years from the date of the issue of the original notes so renewed or refunded.

(9) Nothing in this section implies any guarantee of securities or evidences of indebtedness by the state, or any obligation on the part of the state with respect thereto, and nothing in this section limits the power of any court having jurisdiction to authorize or cause receiver's certificates or debentures to be issued according to the rules and practice obtaining in receivership proceedings in courts of equity.

(10) This section does not apply in any instance where the issuance of securities or evidences of indebtedness is subject to the supervision or control of the federal government or any agency thereof, but the appropriate commission may appear as a party to any proceeding filed or pending before any federal agency if the issuance of the securities or evidences of indebtedness will materially affect any utility over which the commission has jurisdiction.

(11) This section also does not apply to the issuance of securities or evidence of indebtedness by a utility principally engaged in transportation of gas by pipeline in interstate commerce and subject to the supervision, control or jurisdiction of the federal government or any agency, board or commission thereof.

Md. Ann. Code art. 78, § 1 (1980):

The jurisdiction and powers of the Public Service Commission shall extend to all public service companies, as hereinafter defined, engaged in or operating a utility business in this State, and to certain additional motor carriers, as hereinafter provided, to the full extent permitted by the Constitution and laws of the United States. The powers of the Commission shall be liberally construed; and the Commission shall have the powers specifically conferred by this article and by any other law, and also all implied and incidental powers necessary and proper to carry out effectually the provisions of this article.

Md. Ann. Code art. 78, § 2(o) (1980):

(o) "*Public service company*" means a common carrier company, gas company, electric company, steam heating company, telephone company, telegraph company, radio common carrier, water company, sewage disposal company, and/or any combination thereof. Two public service companies shall be considered of the same class, where they are both common carrier companies or both gas companies, electric companies, gas and electric companies, steam heating companies, telephone companies, telegraph companies, water companies or sewage disposal companies.

Md. Ann. Code art. 78, § 3 (1980):

The Public Service Commission is hereby established as the agency to administer this article, and to carry out fully and effectually the functions committed to it by law.

Md. Ann. Code art. 78, § 24 (1980):

(a) *Exercise of franchise.*—Hereafter, no public service company shall exercise any franchise granted by law except to the extent authorized by the Commission.

(b) *Acts prohibited without prior authorization of Commission.*—Hereafter, no public service company shall, without the prior authorization of the Commission:

(1) Assign, lease or transfer any franchise or right thereunder or enter into any agreement or contract materially affecting such franchise or right;

(2) Purchase, acquire, take or hold any part of the capital stock of any other public service company organized or existing under or by virtue of the laws of this State;

(3) Abandon or discontinue in whole or in part the exercise of any franchise or right;

(4) Assume or guarantee any obligation or liability in any capacity or by any means in respect of stocks, bonds, securities, notes or other evidence of indebtedness of any person, payable in whole or in part more than twelve months after the date thereof. This subparagraph shall apply only to corporations organized or existing or hereafter incorporated under or by virtue of the laws of this State.

(5) Issue stocks, bonds, securities, notes, or any other evidence of indebtedness payable in whole or in part more than twelve months after date of issuance. Such stocks, etc., shall be issued in accordance with §§ 65 and 66 of this article. This subparagraph shall apply only to corporations organized or existing or hereafter incorporated under or by virtue of the laws of this State.

(c) *Authority of Commission to authorize acts prohibited in subsection (b).* — Subject to the additional requirements set forth in the following subsections of this section, the Commission may authorize any of the acts enumerated in subsection (b), upon a finding that to do so is consistent with the public convenience and necessity. No authority granted in accordance with this subsection, however, shall revive any lapsed franchise or validate any invalid franchise or enlarge or add to the powers and privileges in any franchise, or waive any forfeiture.

(d) *Prerequisite to grant of authority under subsection (a).* — No authority shall be granted under subsection (a) of this section unless the company has filed with the Commission a

certified copy of its charter and a statement, under oath, of its president and secretary, that it has received the required consent of the proper local authorities.

(e) *Holding, acquiring, etc., capital stock of public service company.* — No public service company shall take, hold, or acquire any part of the capital stock of any public service company of the same class, organized or existing under or by virtue of the laws of this State, without prior authorization by the Commission. No stock corporation of any description (except, with the authorization of the Commission, a company of the same class) shall take, hold or acquire more than ten percent of the total capital stock of any public service company organized or existing under or by virtue of the laws of this State, unless such stock is to be taken as collateral security and the Commission approves of its being so taken; and no such public service company shall be party to the violation of this subsection. For the purposes of this subsection, a company controlling a public service company shall be deemed a public service company of the same class as the controlled public service company.

Md. Ann. Code art. 78, § 27 (1980):

(a) *Prohibited acts.* — No public service company shall in its utility operations:

(1) Sell or render service or furnish any commodity until its schedules of rates therefor have been duly filed and published in accordance with § 28 (a) of this article.

(2) Demand or collect a greater or less compensation for any service or commodity than specified therefor in its schedules as in force at the time,

(3) Demand or collect any charge which for any reason violates any of the provisions of this article,

(4) Assist, suffer or permit any of the things prohibited by this section to be done by any means or device, including but not limited to false billing, false classification, false weighing, or false report of weight.

(b) *Connivance or consent of company or its personnel.*

— No person shall accomplish or seek to accomplish any of the things prohibited by subparagraph (4) of this section, whether with or without the connivance or consent of the public service company or any of its personnel.

(c) *Change in rates.* — Unless the Commission otherwise orders, no public service company shall establish any new rate or make any change in any rate except after thirty days' notice, to the Commission, and publication, in accordance with § 28(a) of this article, during all of said period by means of new schedules or plainly indicated amendments upon the schedules in force and posted, which shall plainly set forth the changes proposed to be made in the schedules then in force and the time when the change in rates is to go into effect.

(d) *Duties and prohibited acts of carriers of flammables.* — (1) It shall be the duty of every common and contract carrier of flammables by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of flammables within the State of Maryland; to establish, observe, and enforce just and reasonable rates, charges, and classification, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, delivering flammables for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of flammables within the State of Maryland.

(2) All charges made for any services rendered or to be rendered by any carrier of flammables by motor vehicle, within the State of Maryland or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. It shall be unlawful for any common carrier to make, give, or cause any undue or unreasonable preference or advantage to any particular person, locality, region, or district, in any respect whatsoever; or to subject any particular person, locality, region, or district, to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever. It shall be unlawful for any contract carrier

by motor vehicle of flammables within the State of Maryland to demand, charge or collect greater or less compensation for such transportation than the charges filed in accordance with § 31 (d) or 27 (a). Provided, however, that this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

(3) Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith.

Md. Ann. Code art. 78, § 28 (1980):

Every public service company shall, in addition to such other duties as may be specifically imposed by this article:

(a) File with the Commission a tariff schedule of its rates and charges. Copies of such schedules shall be plainly printed, shall be open to public inspection, and shall be posted in such manner as to be readily accessible to and conveniently inspected by the public, as may be ordered by the Commission.

(b) File with the Commission an annual report for the preceding calendar year; and such special reports, information, contracts and records of copies thereof as the Commission may direct. The Commission may require that documents filed under this section be under oath.

(c) Furnish instrumentalities, utilities, services, and facilities which are safe, adequate, just, reasonable, economical, and efficient, giving consideration to the conservation of natural resources and the quality of the environment.

(d) Charge just and reasonable rates, in accordance with the provisions of this article, for the utility services rendered by it.

(e) Give notice to the Commission within 30 days, or such time as the Commission may prescribe, of any accident in which the company is involved, which results in personal injury, property damage, or loss of life. Such notice shall be in the form prescribed by the Commission, and shall not be admissible in evidence, or used for any purpose against the

company giving it, in any action for damages arising out of any matter mentioned in the notice.

(f) Comply fully with all the requirements of this article and refrain from violating any of the provisions of this article.

Md. Ann. Code art. 78, § 56 (1980):

The Commission shall supervise and regulate all public service companies subject to its jurisdiction to assure their operation in the interest of the public and to promote adequate, economical, and efficient delivery of utility services in the State without unjust discrimination, giving consideration to the public safety, the economy of the State, the conservation of natural resources, and the preservation of environmental quality. To these ends, the Commission shall enforce compliance by such companies with all the requirements of law, including, but not limited to requirements with respect to financial condition, capitalization, franchises, plant, manner of operation, rates, and service. The powers and duties enumerated specifically in this subtitle are not intended to limit the scope of the general powers and duties of the Commission provided for by this article.

Md. Ann. Code art. 78, § 59A (1982):

The Commission shall require all public service companies subject to its jurisdiction with the exception of taxicabs, radio common carriers, power boat companies, toll bridges, and towing and lightering companies to formulate and, after approval, to implement long-range plans for the provision of service. The Commission shall require all public electric utilities in this State to include in their long-range plans adequate provisions to promote energy conservation in order to decrease or moderate electric and, as appropriate, natural gas demand from their customers. The Commission shall review plans for adequacy under the general standards of § 56, giving attention to the interrelationship of services of other public service companies and to provisions for research and development to assure adequate service. Unless the

authority to review and approve such plans has been granted to another agency of the State by another provision of law, the Commission shall require any revisions to those plans it deems appropriate. As part of this review, and subject to the exceptions provided in any applicable freedom of information act, the Commission shall consult with other agencies of the State and provide opportunity for public comment.

Md. Ann. Code art. 78, § 61 (1980):

The Commission shall have the power in carrying out its duties under this article to examine and inspect any plant of any public service company, and for this purpose shall have access to such plant and shall be entitled to set up and use thereon such needful apparatus or appliances, and, to occupy such space therein as it may deem reasonably necessary for the purpose of such inspections, examinations, and tests.

Md. Ann. Code art. 78, § 62 (1980):

(a) *Power to conduct proceedings.* — The Commission shall institute and conduct any proceedings reasonably necessary and proper to the exercise of any of its powers, or the performance of any of its duties. The Commission, any commissioner, or any hearing examiner shall have the power to examine witnesses, conduct hearings and perform any other acts necessary to the conduct of proceedings. The Commission, any commissioner, the secretary to the Commission, or any hearing examiner shall have the power to administer oaths.

(b) *Staff analysis and recommendations.* — In all matters before the Commission, unless the Commission, after consideration of any staff recommendation as to the extent of staff participation, determines the public interest would not be served thereby, the staff of the Commission shall analyze all data submitted to the Commission, prepare a staff position based on that analysis, and make an evidentiary presentation setting forth the staff's analysis of the issues and its recommendations. In making its analysis and recommendations,

the staff shall be governed by the considerations set forth in § 56. To discharge this responsibility it shall be a party and have all rights of a party to the proceeding, including but not limited to those specified in § 82, and, to the extent it deems necessary in a particular case, it shall present direct and redirect cases of its own, cross-examine, submit briefs, and engage in oral argument to insure that the Commission has a complete record on all relevant issues.

Md. Ann. Code art. 78, § 62A (1980):

The Commission shall initiate and conduct any investigation necessary to the execution of its powers or the performance of its duties under this article.

Md. Ann. Code art. 78, § 63 (1980):

The Commission shall have the power to examine any and all records of any public service company, to compel their production by subpoena duces tecum, and to require sworn copies to be filed with the Commission.

Md. Ann. Code art. 78, § 65 (1980):

(a) *When Commission to authorize issuance of stocks, bonds, etc.* — The Commission shall authorize the issuance by any public service company of stocks, bonds, securities, notes or other evidence of indebtedness, payable in whole or in part more than twelve months after the date of issuance, if, and only if, it finds that such issuance is reasonably required for (i) the acquisition by the issuing company of property or (ii) the construction, completion, extension or improvement of its facilities, or (iii) the discharge or lawful refunding of its obligations, or (iv) the maintenance or improvement of service, or (v) the reimbursement of moneys (not secured by or obtained from such issuance) expended for any of the purposes enumerated in items (i) through (iii) of this subsection, within five years next prior to the filing of an application with the Commission for such reimbursement, or (vi) such issuance may also be authorized by the Commission

in its discretion, (1) for the purpose of making the aggregate capitalization of the company conform to the value of its property or (2) for the payment of a dividend in shares of the company's own stock if the order of the Commission authorizing such issuance states that concurrently with such issuance the company will transfer from surplus to capital an amount to be determined by the Commission, but in no event less than the aggregate par value, or the capital value (if without par value), of the stock whose issuance is so authorized, and that a sum equal to the amount to be so transferred has been expended from income or from any other moneys in the treasury of the corporation not secured by or obtained from or reimbursed by the issue of stocks, bonds, notes or other evidences of indebtedness of such corporation for one or more of the purposes enumerated in items (i) through (iii) of this subsection.

(b) *Form and contents of authorization.* — Any authorization by the Commission pursuant to subsection (a) of this section shall be by order, shall specify the amount of the issuance authorized, and shall recite that such issuance is reasonably required for one or more of the purposes enumerated in subsection (a) of this section, which shall be specifically designated.

(c) *Notes issuable without prior consent of Commission.* — Nothing in this section shall prevent any public service company from issuing, without the prior consent of the Commission, notes for proper corporate purposes, not otherwise in violation of law, payable at periods totaling not more than twelve months after date of issuance; but no such notes shall be refunded directly or indirectly, in whole or in part, by any evidence of indebtedness running for more than twelve months, except in accordance with subsections (a) and (b) of this section.

(d) *Organization of new company after sale under judicial proceedings, etc.* — Notwithstanding subsections (a), (b) and (c) of this section, the Commission is empowered to approve the issuance of such stocks, bonds, securities, notes, or other evidences of indebtedness in such amounts in connection with

the organization of a new public service company by the purchasers of the franchises or property of any public service company sold under judicial proceedings, mortgage or deed of trust, as may in the judgment of the Commission be necessary fully to protect the rights and equities of the holders of the securities of the predecessor company.

Md. Ann. Code art. 78, § 66 (1980):

(a) *Capitalization of contract for consolidation, etc., or of franchise.* — No public service company shall be permitted to capitalize or issue any bonds against or as lien upon any contract for consolidation, merger or lease, or to capitalize any franchise of any character, or right to own any such franchise, in excess of the amount (exclusive of any tax or annual charge) actually paid to the State or a political subdivision as consideration for the grant of such franchise or right.

(b) *Stated capital of company formed by merger or consolidation.* — The stated capital (as determined in accordance with Title 2, Subtitle 3 of the Corporations and Associations Article of the Code) of a public service company formed by the merger or consolidation of two or more corporations shall not exceed merely by virtue of such merger or consolidation the stated capital of the corporations so merged or consolidated, or such stated capital of the merged or consolidated corporations plus any additional sum paid in cash.

(c) *Newly chartered corporation or corporation organized by purchasers at judicial sale, etc.* — Notwithstanding any provision in this article to the contrary, the Commission may approve the capitalization of tangible and intangible property (other than the franchise to be a corporation) of any newly chartered public service corporation or any public service corporation organized or reorganized by the purchasers of the franchises and property of its predecessor at a sale under judicial proceedings, mortgage, or deed of trust, in such amount an in such manner and form as in the judgment of the Commission is reasonably necessary to enable the cor-

poration to procure the necessary capital for its establishment as a going concern.

Md. Ann. Code art. 78, § 67 (1980):

(a) *System and form of records and annual report.* — The Commission may classify the public service companies subject to its jurisdiction, establish a uniform system of records for each of the various classes, and prescribe the manner and form in which the records of the company are to be kept and particular items entered. The system and form of records and the form of annual report prescribed by the Commission shall conform as nearly as possible to those prescribed by the corresponding federal regulatory commission, if any, for public service companies of the same classification in interstate commerce.

(b) *Annual report to be verified; contents.* — The annual report of every public service company shall be verified by oath of the president, treasurer or general manager and, in addition to such other information as might be required by the Commission, shall show:

(1) Amount and kind of authorized capital stock, and of capital stock issued and outstanding;

(2) Amount and kinds of authorized bonded indebtedness, and of bonds and other forms of evidence of indebtedness issued and outstanding;

(3) Receipts and expenditures for the year reported;

(4) The amount paid as dividends and interest upon bonds or other similar indebtedness;

(5) The amount of salary paid to each officer, by name, and the amount paid as wages to employees;

(6) The location of its plants with a full description of its plant and franchises, stating in detail how each franchise stated to be owned was acquired; and when applicable;

(7) (i) A monthly compilation of revenues collected as fuel rate adjustments under § 54F of this article;

(ii) A monthly compilation of expenditures which were the basis for any fuel rate adjustment; and

(iii) An annual recapitulation of subparagraphs (i) and (ii) of this paragraph.

(c) *Commission to furnish blank form of annual report; change in form; when filed.* — The Commission shall furnish a blank form of annual report to each public service company in sufficient time prior to the date when the report is due. No change in the form of annual report shall be made by the Commission which requires a change in the manner or form of keeping the company's records, unless notice of the proposed change is given to the company at least six months before the beginning of the year for which the report is due. The report shall be filed with the Commission within such time as the Commission may direct after the expiration of the year covered by the report.

(d) *Other reports and information; amendment and correction of reports.* — The Commissioner may require amendments or corrections of the reports of any public service company within such time as it may prescribe; and may prescribe the form, contents and deadlines for such other reports and information as it may reasonably desire, including specific answers to questions which the Commission may desire answered.

Md. Ann. Code art. 78, § 67E (1980):

(a) With respect to the debt holdings, a public service company shall describe in its annual report:

(1) Each long-term debt of the respondent in excess of one million dollars, the name and address of the creditor, the character of the debt, nature of any security, the date of origin, the date of maturity, the total amount of the debt, the rate of interest and the total amount of interest to be paid. A copy of any restrictive covenant attached to the indebtedness shall be included in the public service company's application for approval of long-term debt pursuant to § 65 of this article;

(2) Except for the accounts payable of the respondent, each short-term debt, the name and address of the creditor, nature and character of the liability, period of the debt,

rate of interest, total amount of the short-term debt, nature of the security, and the date when debt was paid or the date when the debt must be paid, and a copy of any restrictive covenant attached to the indebtedness; and

(3) Each financing lease arrangement, equipment trust, conditional sales contract, or major liability with respect to the capital assets of the respondent and involving aggregate payments in excess of one million dollars and a copy of any restrictive covenant attached to the indebtedness.

(b) With respect to each holder of more than 5 percent of each issue reported, a public service company shall list the name, address, and type of holder as defined in subsection (f) of § 67A if available.

(c) With respect to the long-term debt where that indebtedness is widely held, like bonds and debentures, a public service company shall list the name of the trustee in place of the creditor if available.

Md. Ann. Code art. 78, § 68 (1980):

(a) The Commission shall have the power to determine just and reasonable rates of public service companies, whether as maximum, minimum or maximum and minimum, respectively. The rates so determined shall be fixed by order to be served upon each public service company affected thereby.

(b) The Commission may not authorize telephone company charges to be levied for directory assistance calls made by residential customers upon the first 12 calls made to directory assistance from each residential service per monthly billing cycle. The Commission may not authorize telephone company charges to be levied for directory assistance upon any person or persons who suffer from physical or visual handicaps which preclude their use of telephone directories and it may provide other exemptions which are just and reasonable.

(c) (1) The Commission may not authorize any mandatory telephone company charges based on a measured time

period unit rate for local messages except as provided in paragraph (2) of this subsection.

(2) After June 30, 1981, for computer data transmissions, the Commission may authorize mandatory telephone company charges based on a cost-justified measured time period unit rate for local messages.

Md. Ann. Code art. 78, § 69 (1980):

(a) *"Just and reasonable rates" defined; carriers of flammables excepted.* — "Just and reasonable rates" means rates which are not in violation of any of the provisions of this article, which fully consider and are consistent with the public good, and which will result in an operating income to the public service company, except carriers of inflammables, yielding, after reasonable deduction for depreciation and other necessary and proper expenses and reserves, a reasonable return upon the fair value of the company's property used and useful in rendering service to the public.

(b) *Determination of fair and equitable operating ratio for carriers of flammables.* — In the exercise of its power to prescribe just and reasonable rates, and charges for the transportation carriers of flammables by motor vehicle, and classifications, regulations, and practices relating thereto, the Commission shall give due consideration, among other factors, to the inherent advantages of transportation by such carriers; to the need, in the public interest, of adequate and efficient transportation services by such carriers at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable such carrier, under honest, economical, and efficient management, to provide such service, and upon consideration of such matters shall establish the need for proper revenue by determination of a fair and equitable operating ratio, which is the relationship of carrier expenses to carrier operating revenues.

(c) *Lobbying expenses.* — A public service company may not charge off against its rate payers expenses for lobbying.

(d) *Discouraging use of employee stock ownership plans.*

— In the exercise of its power to prescribe just and reasonable rates, the Commission may not discourage the use of employee stock ownership plans by public service companies, by denying them the full benefits of investment tax credits provided in connection with these plans by the Federal Internal Revenue Code.

Md. Ann. Code art. 78, § 69B (1982):

(a) The provisions of this section apply only to gas, electric, and telephone companies whose gross annual revenues for the most recent calendar year for which data is available are less than 3 percent of the total gross annual revenues of all public service companies in the State during the same calendar year.

(b) Upon the suspension of a proposed new rate for a gas, electric, or telephone company which is based upon the existing authorized fair rate of return, the Commission shall promptly institute proceedings to determine if additional revenues are required to provide the company the opportunity to earn the existing authorized fair rate of return. The Commission shall serve each of the parties to the last preceding case with a copy of the suspension order and shall order the applicant to have published a display advertisement in newspapers of general circulation in its service area advising of the proposal. These proceedings shall account for revenues, expenses, and rate base in a manner identical to that employed by the Commission in determining the justice and reasonableness of rates in the last preceding base rate proceeding, and shall exclude consideration of any increase in the rate of return, any alteration in the rate structure, or an accounting approach to any item pertaining to revenues, expenses, or rate base inconsistent with that employed by the Commission in determining the justice and reasonableness of rates in the last preceding base rate proceeding, except that the Commission may use a more recent past test period. The Commission shall enter a final order as to the revenue requirement determined pursuant to this section within 90 days of the filing of the proposed new rate. The final order entered shall:

(1) Authorize a new rate distributing any change in the revenue requirement proportionally among the ratepayers without change in the rate structure; and

(2) Include a determination as to whether or not further proceedings shall be held. If the Commission in the final order under this subsection determines that further proceedings shall be held under subsection (c) of this section, the final order may provide for refunds consistent with the provisions of § 70 (c) of this article of any difference between the new rate authorized under this subsection and the rate established by the Commission under subsection (c) of this section.

(c) If the Commission determines under subsection (a) of this section that further proceedings shall be held, nothing in this section shall preclude the Commission from modifying after a hearing the rate structure, lowering the authorized fair rate of return, or modifying the accounting approach to any item pertaining to revenues, expenses, or rate base within 120 days following entry of a final order under subsection (a) of this section.

(d) The provisions of this section may not apply to any proposed new rate filed less than one year following the date of filing of a previously proposed new rate under this section.

(e) The provisions of this section may not apply to any proposed new rate filed with a request for temporary rates pursuant to § 71 of this article.

(f) If any proposed new rate filed under this section is still pending, the company may not file a proposed new rate under this section or any other section. If any new rate filed under this section has been in effect less than 90 days, the company may not file any proposed new rate under any section. This subsection does not preclude a company from filing a proposed new rate for a new service if the proposal does not affect the authorized rate of return.

(g) Unless otherwise provided by the Commission, this section does not apply to any proposed new rate filed more than 3 years following the entry of the Commission's final

order authorizing the existing fair rate of return. The provisions of this section and any regulations promulgated under this section are of no effect and may not be enforced after July 1, 1985.

Md. Ann. Code art. 78, § 70 (1980):

(a) *Suspension of proposed new rate; effective date of rate where not suspended.* — The Commission may suspend, effective forthwith, and without formal proceedings any new rate proposed by a public service company. In such case, the Commission shall furnish to the proponent of the rates suspended a statement, in writing, of the reasons for such suspension. Unless so suspended, any new rate or change in rate proposed by the public service company, shall, subject to § 27 (c) of this article, go into effect upon the date specified in the application.

(b) *Proceedings as to justice and reasonableness of rates suspended; duration of suspension.* — The Commission shall promptly institute proceedings as to the justice and reasonableness of the rate suspended. The suspension may be initially for a period of not more than 150 days beyond the time when the rates would otherwise go into effect; and if the Commission finds that the proceedings cannot be completed within the period of the initial suspension, it may extend the suspension for an additional thirty days. After the expiration of 150 days or 180 days, as the case may be, if no final order has been entered by the Commission, the new rate or change in rate proposed by the public service company shall go into effect, subject to subsection (c) of this section.

(c) *Where rate goes into effect before final order in proceedings.* — If a proposed new rate or change of rate effecting an increase goes into effect before a final order is entered in the said proceedings, the Commission may, where practicable, order the proponent to keep a detailed and accurate account of all amounts received by reason of such new rate or increase, and the persons on whose behalf such amounts are paid, and after the conclusion of said proceedings, require the proponent

to refund, with interest, to every such person, such part of the new or the increased rates as the Commission finds unjustified. If such refund is not practicable, the company shall charge off and amortize, by means of a temporary decrease, to be fixed by the Commission, below the rates as finally determined, for such period as the Commission may determine, the difference between the operating revenues under the rates charge [charged] and the operating revenues that would have been obtained from the same volume of business from the rates as finally determined.

Md. Ann. Code art. 78, § 73 (1980):

(a) The Commission may by regulation passed after due notice and opportunity for interested parties to be heard prescribe standards of safe, adequate, reasonable, and proper service for any class of public service company, which in the Commission's opinion will best promote the security or convenience of the public, of those employed in furnishing service, and of those to whom service is rendered; and to these ends, the Commission may enforce the standards set by it, and may by order require changes and additions in the service of any public service company as the Commission deems necessary, including but not limited to repairs or improvements in plant, increase in motive power, and change in schedule or manner of operations.

(b) The Commission shall examine alternatives to transmission line construction in any service area, including the use of existing lines of any company whether or not franchised in that service area, if (1) the existing lines are convenient to that service area, or (2) the use of the lines will best promote the economy and efficiency of service to the public.

Md. Ann. Code art. 78, § 75 (1980):

(a) *Commission may require continuance of service; consent of Commission to discontinuance required.* — The Commission may require the continuance of any service rendered to the public by any public service company under

any franchise, right, or permit, after its expiration date, if any; and no service under a franchise, right or permit shall be discontinued or abandoned without the consent of the Commission, which shall be granted if the Commission finds that the present or future public convenience and necessity permits such discontinuance or abandonment. Denial of such consent shall not preclude subsequent reapplications whenever the public service company thinks them warranted.

(b) *Grant of abandoned or discontinued right or franchise.* — Whenever the Commission permits abandonment or discontinuance of any franchise or right in whole or in part involving service to and/or from suburban communities, the Commission shall consider all applications to acquire the franchise or right to render such service and shall grant the application of the best qualified applicant. If the abandoned or discontinued right, as acquired by the abandoning or discontinuing public service company or its predecessor, extended from mid-city to suburban termini, or was operated between such termini during most of the time of its existence, or for an aggregate of fifteen years or more, then the said franchise or right to be granted in accordance with this subsection shall likewise extend between such mid-city and suburban termini.

Md. Ann. Code art. 78, § 99 (1982):

When the Commission is of the opinion that any public service company subject to its jurisdiction is violating or is about to violate any of the provisions of this article, it shall cause action to be brought in its name for mandamus or injunction in the circuit court of any county in which the company does business or has its principal place of business. The court shall allow a period not exceeding 20 days to show cause why the relief prayed should not be granted, and shall upon the expiration of said period immediately inquire into the merits, without other or formal pleadings and without respect to any technical requirement. The court may join as parties such persons as may be necessary or proper to make its judgment or processes effective, and shall make such final order, granting such relief, as may be appropriate.

Md. Ann. Code art. 78, § 101 (1980):

(a) *Violation of article a misdemeanor.* — Every natural person, whether or not an officer or agent of a public service company or personnel of the Commission, who knowingly violates any of the provisions of this article, or procures, aids or abets any such violation by any public service company, shall be guilty of a misdemeanor.

(b) *Violation of § 16A by personnel of Commission or people's counsel.* — All personnel of the Commission or the office of the people's counsel who are convicted of violating § 16A of this article, prohibiting certain conduct by personnel of the Commission, shall, in addition to other penalties, be removed or discharged from office.

(c) *General penalty for violation of article.* — Every natural person convicted of a violation of any of the provisions of this article shall be subject to a fine not exceeding $1000 for the first offense, and not exceeding $5000 for each additional or subsequent offense, unless a different punishment is specifically provided for such violation by law.

(d) *Violation of provisions relating to taxicabs.* — Any natural person convicted of violating any of the provisions of this article respecting taxicabs shall be subject to a fine not exceeding $50 for the first offense and not exceeding $100 for each additional or subsequent offense.

Md. Ann. Code art. 78, § 104 (1980):

Every contract, assignment, transfer or agreement for transfer or purchase of any stock in violation of any provision of this article shall be entirely void and ineffective for any purpose.

Mo. Ann. Stat. § 386.250 (Vernon supp. 1982):

The jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under this chapter

(1) To all railroads within this state, and to all transportation of persons or property thereon, and to the person or corporation owning, leasing, operating or controlling the same;

(2) To all street railroads within this state, and to all transportation of persons or property thereon, and to the person or corporation owning, leasing, operating or controlling the said street railroad;

(3) To such portion of the lines of any other railroad and street railroad as lie within this state, and to the person or corporation owning, leasing, operating or controlling the same, so far as concerns the construction, maintenance, equipment, terminal facilities and local transportation facilities and local transportation of persons or property within this state;

(4) To all common carriers operating or doing business within this state;

(5) To the manufacture, sale or distribution of gas, natural and artificial, and electricity for light, heat and power, within the state, and to persons or corporations owning, leasing, operating or controlling the same; and to gas and electric plants, and to persons or corporations owning, leasing, operating or controlling the same;

(6) To all telephone lines, as above defined, and all telegraph lines, as above defined, and to every telephone company, and to every telegraph company, so far as said telephone and telegraph lines are and lie, and so far as said telephone companies and said telegraph companies conduct and operate such line or lines, respectively, within this sate;

(7) To all water corporations, and to the land, property,

dams, water supplies, or power stations thereof and the operation of same within this state; provided, that nothing contained in this section shall be construed as conferring jurisdiction upon the public service commission over the service or rates of any municipally owned water plant or system in any city of this state except where such service or rates are for water to be furnished or used beyond the corporate limits of such municipality;

(8) To all persons, corporations or partnerships engaged in the transportation of property or freight, as above defined, within this state;

(9) To all sewer systems and their operations within this state and to persons or corporations owning, leasing, operating or controlling the same;

(10) To all public utility corporations and persons whatsoever subject to the provisions of this chapter as herein defined;

(11) To the adoption of rules as are supported by evidence as to reasonableness and which prescribe the conditions of rendering public utility service, disconnecting or refusing to reconnect public utility service and billing for public utility service. All such proposed rules shall be filed with the secretary of state and published in the Missouri register as provided in chapter 536, RSMo, and a hearing shall be held at which affected parties may present evidence as to the reasonableness of any proposed rule. Any rule or portion of a rule promulgated pursuant to this section may be suspended by the joint committee on administrative rules if after hearing thereon the committee finds that such rule or portion of the rule is beyond or contrary to the statutory authority of the agency which promulgated the rule, or is inconsistent with the legislative intent of the authorizing statute. The general assembly may reinstate such rule by concurrent resolution signed by the governor; and

(12) To such other and further extent, and to all such other and additional matters and things, and in such further respects as may herein appear, either expressly or impliedly.

Mo. Ann. Stat. § 386.320 (Vernon 1952):

1. The commission shall have the general supervision of all common carriers, railroads, street railroads, railroad corporations, street railroad corporations, and of all telegraph corporations or telephone corporations, and telegraph and telephone lines, as herein defined, and shall have power to and shall examine the same and keep informed as to their general condition, their capitalization, their franchises and the manner in which their lines and property, owned, leased, controlled or operated are managed, conducted and operated, not only with respect to the adequacy, security and accommodation afforded by their service, but also with respect to their compliance with all the provisions of law, orders and decisions of the commission and charter and franchise requirements.

2. The commision shall have power, either through its members or responsible engineers or inspectors or employees duly authorized by it, to enter in and upon and to inspect the property, equipment, buildings, plants, factories, power houses, offices, apparatus, machines, devices and lines of any of such corporations or persons, including the right for such inspection purpose to ride upon any freight locomotive or train or any passenger locomotive or train while in service; and to have upon reasonable notice the use of an inspection locomotive or special locomotive and inspection car for a physical inspection once annually of all the lines and stations of each common carrier under its supervision; and to the extent that such facilities for inspection involve transportation each commissioner and each such employee shall pay the published one way fare established by the common carrier for the transportation of persons by regular passenger trains over the distance covered by such inspection. The cost of such transportation, if the commission so elects, may be paid upon bill rendered to the commission after the transportation has been furnished and the amount thereof ascertained.

3. The commission and each commissioner shall have power to examine all books, contracts, records, documents and papers of any person or corporation subject to its supervision,

and by subpoena duces tecum to compel production thereof. In lieu of requiring production of originals by subpoena duces tecum, the commission or any commissioner may require sworn copies of any such books, records, documents, contracts and papers or parts thereof to be filed with it.

Mo. Ann. Stat. § 392.200.3 (Vernon 1952):

No telegraph corporation or telephone corporation shall make or give any undue or reasonable preference or advantage to any person, corporation or locality, or subject any particular persons, corporation or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; provided, that messages by telegraph or telephone may be classified into day, night, repeated, unrepeated, commercial, press, government and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages.

Mo. Ann. Stat. § 392.240 (Vernon 1952):

1. Whenever the commission shall be of the opinion, after a hearing had upon its own motion or upon a complaint, that the rates, charges, tolls or rentals demanded, exacted, charged or collected by any telegraph corporation or telephone corporation for the transmission of messages or communications by telegraph or telephone, or for the rental or use of any telegraph line, telephone line or any telegraph instrument, wire, appliances, apparatus or device or any telephone receiver, transmitter, instrument, wire, cable, apparatus, conduit, machine, appliance or device or any telephone extension system, or that the rules, regulations or practices of any telegraph corporation or telephone corporation affecting such rates, charges, rentals or service are unjust, unreasonable, unjustly discriminatory or unduly preferential or in anywise in violation of law, or that the maximum rates, charges or rentals chargeable by any such telegraph corporation or telephone corporation are insufficient to yield reasonable compensation for the service rendered, the commission shall with due regard, among other things, to a reasonable average

return upon the value of the property actually used in the public service and of the necessity of making reservation out of income for surplus and contingencies, determine the just and reasonable rates, charges and rentals to be thereafter observed and in force as the maximum to be charged, demanded, exacted or collected for the performance or rendering of the service specified and shall fix the same by order to be served upon all telegraph corporations and telephone corporations by which such rates, charges and rentals are thereafter to be observed, and thereafter no increase in any rate, charge or rental so fixed shall be made without the consent of the commission.

2. Whenever the commission shall be of the opinion, after a hearing had upon its own motion or upon complaint, that the rules, regulations or practices of any telegraph corporation or telephone corporation are unjust or unreasonable, or that the equipment or service of any telegraph corporation or telephone corporation is inadequate, insufficient, improper or inefficient, the commission shall determine the just, reasonable, adequate, efficient and proper regulations, practices, equipment and service thereafter to be installed, to be observed and used and to fix and prescribe the same by order to be served upon every telegraph corporation and telephone corporation to be bound thereby, and thereafter it shall be the duty of every telegraph corporation and telephone corporation to which such order is directed to obey each and every such order so served upon it and to do everything necessary or proper in order to secure compliance with and observance of every such order by all its officers, agents and employees according to its true intent and meaning. Nothing contained in this chapter shall be construed as giving the commission power to make any order, direction or requirement requiring any telegraph corporation or telephone corporation to perform any act which is unjust or unreasonable or in violation of any law of this state or of the United States not inconsistent with the provisions of this chapter.

3. Whenever the commission, after a hearing had upon its own motion or upon complaint, shall find that a physical connection can reasonably be made between the lines of two

or more telephone corporations or two or more telegraph corporations whose lines can be made to form a continuous line of communication by the construction and maintenance of suitable connections for the transfer of messages or conversations, and that public convenience and necessity will be subserved thereby, or shall find that two or more telegraph or telephone corporations have failed to establish joint rates, tolls or charges for service by or over their said lines, and that joint rates, tolls or charges ought to be established, the commission may, by its order, require that such connection be made, except where the purpose of such connection is primarily to secure the transmission of local messages or conversations between points within the same city or town, and the conversations be transmitted and messages transferred over such connection under such rules and regulations as the commission may establish, and prescribe through lines and joint rates, tolls and charges to be made, and to be used, observed and in force in the future. If such telegraph or telephone corporations do not agree upon the division between them of the cost of such physical connection or connections or the division of the joint rates, tolls or charges established by the commission over such through lines, the commission shall have authority, after further hearing, to establish such division by supplemental order.

Mo. Ann. Stat. § 392.250 (Vernon 1952):

Whenever the commission shall be of the opinion, after a hearing had upon its own motion or upon complaint, that repairs or improvements to or changes in any telegraph line or any telephone line ought reasonably to be made, or that any additions should reasonably be made thereto, in order to promote the convenience of the public or employees, or in order to secure adequate service or facilities for telegraphic or telephonic communications, the commission shall make and serve an order directing that such repairs, improvements, changes or additions be made within a reasonable time and in a manner to be specified therein, and every telegraph corporation and telephone corporation is hereby required and directed to make all repairs, improvements, changes and

additions required of it by any order of the commission served upon it.

Mo. Ann. Sat. § 392.260 (Vernon 1952):

No telegraph corporation or telephone corporation hereafter formed shall begin construction of its telegraph line or telephone line without first having obtained the permission and approval of the commission and its certificate of public convenience and necessity, after a hearing had upon such notice as the commission may prescribe. Before any such certificate shall be issued there must be filed in the office of the commission by the applicant therefor a verified statement showing that the required consent of the proper municipal authorities has been obtained. The commission may by its order impose such condition or conditions as it may deem reasonable and necessary. Unless exercised within a period of two years from the grant thereof authority conferred by such certificate of convenience and necessity issued by the commission shall be null and void.

Mo. Ann. Stat. § 392.270 (Vernon 1952):

1. The commission shall have the power to ascertain the value of the property of every telegraph corporation and telephone corporation in this state and every fact which in its judgment may or does have any bearing on such value. The commission shall have power to make revaluations from time to time and to ascertain all new construction, extensions and additions to the property of every telegraph corporation and telephone corporation.

2. For the purpose of ascertaining the matters and things specified in this section, concerning the value of the property of telegraph corporations and telephone corporations, the commission may cause a hearing or hearings to be held at such time or times and place or places as the commission may designate. Before any hearing is had the commission shall give the telegraph corporation or telephone corporation affected thereby at least thirty days' written notice, specifying

the time and place of such hearing, and such notice shall be sufficient to authorize the commission to inquire into the matters designated in this section, but this provision shall not prevent the commission from making any preliminary examination or investigation into the matters herein referred to, or from inquiring into such matters in any other investigation or hearing. All telegraph corporations or telephone corporations affected shall be entitled to be heard and to introduce evidence at such hearing or hearings. The commission is empowered to resort to any other source of information available, which information shall be offered in evidence on such hearing. The evidence introduced at such hearing or hearings shall be reduced to writing and certified under the seal of the commission. The commission shall make and file its findings of fact in writing upon all matters concerning which evidence shall have been introduced before it which in its judgment have bearing on the value of the property of the telegraph corporation or telephone corporation affected. Such findings shall be subject to review by any circuit court of this state in the same manner and within the same time as other orders and decisions of the commission. The findings of the commission so made and filed, when properly certified under the seal of the commission, shall be admissible in evidence in any action, proceeding or hearing before the commission or any court in which the commission, the state or any officer, department, or institution thereof, or any county, city, municipality or other body politic and the telegraph corporation or telephone corporation affected may be interested, whether arising under the provisions of this law or otherwise, and such findings, when so introduced, shall be conclusive evidence of the facts therein stated as of the date therein stated under conditions then existing, and such facts can only be controverted by showing a subsequent change in conditions bearing upon the facts therein determined. The commission may from time to time cause further hearings and investigations to be had for the purpose of making revaluations or ascertaining the value of any betterments, improvements, additions or extensions made by any telegraph corporation or telephone corporation subsequent to any prior hearing or investigation and may examine into all

matters which may change, modify or affect any finding of fact previously made, and may at such time make findings of fact supplementary to those theretofore made. Such hearings shall be had upon the same notice and be conducted in the same manner, and the findings so made shall have the same force and effect as is provided herein for such original notice, hearings and findings; provided, that such findings made at such supplemental hearings or investigations shall be considered in connection with and as a part of the original findings except insofar as such supplemental findings shall change or modify the findings made at the original hearing or investigation.

Mo. Ann. Stat. § 392.300 (Vernon 1952):

1. No telegraph corporation or telephone corporation shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, line or system, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, merge or consolidate such line or system, or franchises, or any part thereof, with any other corporation, person or public utility, without having first secured from the commission an order authorizing it so to do. Every such sale, assignment, lease, transfer, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing the same shall be void. The permission and approval of the commission to the exercise of a franchise or permit under this chapter, or the sale, assignment, lease, transfer, mortgage or other disposition or encumbrance of a franchise or permit under this section shall not be construed to revive or validate any lapsed or invalid franchise or permit, or to enlarge or add to the powers or privileges contained in the grant of any franchise or permit, or to waive any forfeiture. Nothing in this subsection contained shall be construed to prevent the sale, lease or other disposition by any corporation, person or public utility of a class designated in this subsection of property which is not necessary or useful in the performance of its duties to the public, and any sale of its property by such corporation,

person or public utility shall be conclusively presumed to have been of property which is not useful or necessary in the performance of its duties to the public, as to any purchaser of such property in good faith for value.

2. Save where stock shall be transferred or held for the purpose of collateral security, no stock corporation, domestic or foreign, other than a telegraph corporation or telephone corporation, shall, without the consent of the commission, purchase or acquire, take or hold more than ten per cent of the total capital stock issued by any telegraph corporation or telephone corporation organized or existing under or by virtue of the laws of this state, except that a corporation now lawfully holding a majority of the capital stock of any telegraph corporation or telephone corporation may, without the consent of the commission, acquire and hold the remainder of the capital stock of such telegraph corporation or telephone corporation, or any portion thereof. Nothing herein contained shall be construed to prevent the holding of stock heretofore lawfully acquired, or to prevent, upon the surrender or exchange of such stock pursuant to a reorganization plan, the purchase, acquisition, taking or holding of a proportionate amount of stock of any new corporation organized to take over, at foreclosure or other sale, the property of any corporation whose stock has been thus surrendered or exchanged. Every contract, assignment, transfer or agreement for transfer of any stock by or through any person or corporation to any corporation in violation of any provision of this chapter shall be void and of no effect, and no such transfer or assignment shall be made upon the books of any such telegraph corporation or telephone corporation, or shall be recognized as effective for any purpose.

Mo. Ann. Stat. § 392.320.2 (Vernon 1952):

No telegraph corporation or telephone corporation governed by the provisions of this chapter shall declare any stock, bond or scrip dividend or divide the proceeds of the same of any stock, bond or scrip among its stockholders unless authorized by the commission so to do.

Mo. Ann. Stat. § 392.340 (Vernon 1952):

1. Reorganization of telegaph corporations and telephone corporations shall be subject to the supervision and control of the commission and no such reorganization shall be had without the authorization of such commission.

2. Upon all such reorganizations the amount of capitalization, including therein all stocks and bonds and other evidence of indebtedness, shall be such as is authorized by the commission, which, in making its determination, shall not exceed the fair value of the property involved, taking into consideration its original cost of construction, duplication cost, present condition, earning power at reasonable rates and all other relevant matters and any additional sum or sums as shall be actually paid in cash; provided, however, that the commission may make due allowance for discount of bonds. Any reorganization agreement before it becomes effective shall be amended so that the amount of capitalization shall conform to the amount authorized by the commission. The commission may by its order impose such condition or conditions as it may deem reasonable and necessary.

NEW HAMPSHIRE
PUBLIC SERVICE COMMISSION LAWS

N.H. Rev. Stat. Ann. § 362:2 (1966):

The term public utility shall include every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court, except municipal corporations operating within their corporate limits, owning, operating or managing any railroad or bus line for the common carriage of passengers, or carrying on a public express business over the line of any railroad, any plant or equipment or any part of the same for the conveyance of telephone or telegraph messages or for the manufacture or furnishing of light, heat, power or water for the public, or in the generation, transmission or sale of electricity ultimately sold to the public or owning or operating any toll bridge or toll road, or owning or operating any steam or other power boat engaged in the common carriage of passengers or freight, or owning or operating any pipe line, including pumping stations, storage depots and other facilities, for the transportation, distribution or sale of gas, crude petroleum, refined petroleum products, or combinations thereof, cooperative marketing associations, organized for purposes of rural electrification, or any other business except as hereinafter exempted, over which on September 1, 1951, the public utilities commission exercised jurisdiction.

N.H. Rev. Stat. Ann. § 369:1 (1966):

A public utility lawfully engaged in business in this state may, with the approval of the commission but not otherwise, issue and sell its stock, bonds, notes and other evidences of indebtedness payable more than twelve months after the date thereof for lawful corporate purposes. The proposed issue and sale of securities will be approved by the commission where it finds that the same is consistent with the public good. Such approval shall extend to the amount of the issue authorized and the purpose or purposes to which the securities or the proceeds thereof are to be applied, and shall be subject

to such reasonable terms and conditions as the commission may find to be necessary in the public interest; provided however that the provisions of chapter 294, RSA, shall be observed by corporations organized under the laws of this state in respect of the corporate authorization required and of other formalities to be observed.

N.H. Rev. Stat. Ann. § 369:2 (1966):

A public utility may, with the approval of the commission but not otherwise, mortgage its present and future property, tangible and intangible including franchises, to secure the payment of its bonds or notes including any bonds or notes to be thereafter issued under the provisions of such mortgage, provided, however, that no such approval shall be required for any mortgage of property pursuant to after-acquired clauses of mortgages securing the payment of bonds or notes issued prior to September 1, 1951.

N.H. Rev. Stat. Ann. § 369:3 (1966):

Any such public utility which may apply to the commission for authority to issue such securities shall file with its application a statement in reasonable detail, showing the actual cost already incurred and the estimated cost to be incurred for any of the purposes for which such securities are to be issued and the actual cost already incurred and the estimated cost to be incurred for such purposes.

N.H. Rev. Stat. Ann. § 369:4 (1966):

The commission, after such hearing or investigation as it may deem proper, shall determine the actual or probable cost incurred or to be incurred; and, if in its judgment the issue of such securities upon the terms proposed is consistent with the public good, it shall authorize the same to an amount sufficient, at the price fixed in accordance with the laws applicable thereto, to provide funds for defraying the cost as so determined.

N.H. Rev. Stat. Ann. § 369:7 (Supp. 1981):

I. No public utility engaged in business within this state shall issue or renew any notes, bonds, or other evidences of indebtedness payable less than 12 months after the date thereof, except as provided in this section, by rules adopted by the commission, or by specific order of the commission in an individual case.

II. The commission may adopt rules under RSA 541-A relative to a reasonable amount of the notes, bonds, or other evidences of indebtedness based on the amount of their respective plant investment which each utility shall not exceed without first obtaining the approval of the commission. In establishing the amounts of the notes, bonds, and other evidences of indebtedness which the utility is permitted to issue or renew without prior commission approval, the commission shall consider the size, circumstances, and other characteristics of each utility, the aggregate term of the renewals of such notes, bonds, and other evidences of indebtedness, and the time period and manner for reporting such renewals to the commission.

N.H. Rev. Stat. Ann. § 369:11 (1966):

No public utility shall apply the proceeds of any stock, bonds or notes to any other purpose than those specified in the order of the commission authorizing the issue of the same.

N.H. Rev. Stat. Ann. § 369:12 (1966):

Every public utility issuing stocks, bonds or other evidence of indebtedness subject to the provisions hereof shall file with the commission an account showing, in such detail as the commission shall require, the disposition of the proceeds of such issue.

N.H. Rev. Stat. Ann. § 369:14 (1966):

A public utility for any corporate purpose approved by the commission, upon petition of the corporation, may from time

to time, with the authority of the commission as provided in this chapter, increase its capital stock or bonds beyond the amounts fixed and limited by its articles of association or its charter or by any act of the general court.

N.H. Rev. Stat. Ann. § 369:15 (1966):

Whenever a public utility organized under the laws of this state shall issue (1) additional shares of its capital stock having unconditionally the general right to vote or (2) securities convertible into shares of such capital stock, it shall, except as hereinafter provided, first offer such shares or convertible securities proportionately to holders of its stock having such voting right in such manner as shall have been determined by its directors; provided however, that if the charter, articles of agreement or stockholder votes authorizing the outstanding stock have limited or eliminated the rights of holders of such outstanding stock to subscribe to such shares or convertible securities, such offer need not be made, except to the extent, if any, required by said charter, articles of agreement or votes.

N.H. Rev. Stat. Ann. § 374:1 (1966):

Every public utility shall furnish such service and facilities as shall be reasonably safe and adequate and in all other respects just and reasonable.

N.H. Rev. Stat. Ann. § 374:3 (1966):

The public utilities commission shall have the general supervision of all public utilities and the plants owned, operated or controlled by the same, so far as necessary to carry into effect the provisions of this title.

N.H. Rev. Stat. Ann. § 374:4 (1966):

The commission shall have power, and it shall be its duty, to keep informed as to all public utilities in the state, their capitalization, franchises and the manner in which the lines

and property controlled or operated by them are managed and operated, not only with respect to the safety, adequacy and accommodation offered by their service, but also with respect to their compliance with all provisions of law, orders of the commission and charter requirements.

N.H. Rev. Stat. Ann. § 374:5 (1966):

For the purpose of enabling the commission to perform its duty to keep informed as provided in section 4, every public utility before making any addition, extension, or capital improvement to its fixed property in this state, except under emergency conditions, shall report to the commission the probably cost of such addition, extension, or capital improvement, whenever the probable cost thereof exceeds a reasonable amount to be prescribed by general or special order of the commission. For this purpose the commission may classify public utilities according to the amount of their respective fixed capital accounts, and prescribe a reasonable limitation for each such classification. In no case shall the minimum amount prescribed be less than one-quarter of one per cent of such fixed capital account as of December 31 of the preceding year, or ten thousand dollars, whichever is the smaller amount. Reports shall be filed in writing with the commission within such reasonable time, as may be prescribed by the commission, before starting actual construction on any addition, extension, or improvement. The commission shall have discretion to exclude the cost of any such addition, extension, or capital improvement from the rate base of said utility, where such written report thereof shall not have been filed in advance as herein provided.

N.H. Rev. Stat. Ann. § 374:13 (1966):

When the commission has prescribed the form of accounts and records to be kept by public utilities of any class, each public utility of that class shall thereafter keep the accounts and records so prescribed accurately and honestly and in the manner prescribed, and it shall be unlawful for it to keep any other accounts or records, covering the matters included in

the accounts and records prescribed, except those which it may be required to keep by the authority of the United States or of any other state.

N.H. Rev. Stat. Ann. § 374:22 (Supp. 1981):

I. No person or business entity shall commence business as a public utility within this state, or shall engage in such business, or begin the construction of a plant, line, main or other apparatus or appliance to be used therein, in any town in which it shall not already be engaged in such business, or shall exercise any right or privilege under any franchise not theretofore actually exercised in such town, without first having obtained the permission and approval of the commission.

II. No permission or approval under this section shall be required to be obtained by a foreign electric utility as defined in RSA 374-A:1 in connection with its participation in an electric power facility as defined in said section where the electric utility having the largest financial interest therein and the utility or utilities having primary responsibility for the construction or operation of the facility are domestic electric utilities as defined in said section or have obtained such permission.

N.H. Rev. Stat. Ann. § 374:28 (1966):

The commission may authorize any public utility to discontinue, temporarily or during such portion of each year as the commission may deem expedient, any part of its service whenever it shall appear that such temporary or seasonal discontinuance will not unreasonably inconvenience the public, or to discontinue the same permanently and remove the equipment essential to the same, whenever it shall appear that the public good does not require the further continuance of such service. The commission, upon its own motion or upon petition of any interested party, may make an order withdrawing from a public utility its authority to engage in business in all or any part of the territory in which it is

authorized to operate, whenever it shall find after notice and public hearing that said utility has declined or unreasonably failed to render service in said territory or that its service in said territory is inadequate, no sufficient reason for such inadequacy appearing.

N.H. Rev. Stat. Ann. § 374:30 (1966):

Any public utility may transfer or lease its franchise, works or system, or any part of such franchise, works or system, exercised or located in this state, or contract for the operation of its works and system located in this state, when the commission shall find that it will be for the public good and shall make an order assenting thereto, but not otherwise. The commission may, by general order, authorize a public utility to transfer to another public utility a part interest in poles and their appurtenances for the purpose of joint use by such public utilities.

N.H. Rev. Stat. Ann. § 378:1 (1966):

Every public utility shall file with the public utilities commission, and shall print and keep open to public inspection, schedules showing the rates, fares, charges and prices for any service rendered or to be rendered, in such places, within such time, in such form and with such detail, as the commission may order.

N.H. Rev. Stat. Ann. § 378:2 (1966):

In the case of public utilities subject to regulation by duly constituted federal authority the requirements relative to the filing of schedules with the commission and to the publication thereof shall conform as nearly as may be to the requirements of said federal authority.

N.H. Rev. Stat. Ann. § 378:3 (1966):

Unless the commission otherwise orders, no change shall be made in any rate, fare, charge or price, which shall have

been filed or published by a public utility in compliance with the requirements hereof, except after thirty days' notice to the commission and such notice to the public as the commission shall direct.

N.H. Rev. Stat. Ann. § 378:4 (1966):

The commission may approve a general retroactive reduction in rates by any public utility, covering service for which payment has not been made, when no discrimination will be caused thereby.

N.H. Rev. Stat. Ann. § 378:5 (1966):

Whenever any schedule shall be filed with the commission stating new and higher rates, fares, charges or prices, which the public utility filing the same proposes to put into force, the commission may investigate the reasonableness of such proposed rates, fares, charges or prices.

N.H. Rev. Stat. Ann. § 378:6 (1966):

Pending any such investigation and the decision thereon, the commission shall have power, by an order served upon the public utility affected, to suspend the taking effect of said schedule and to forbid the demanding or collecting of the rates, fares, charges or prices covered by the schedule for such period or periods, not to exceed twelve months in all, as in the judgment of the commission may be necessary for such investigation. If for any reason the commission is unable to make its determination prior to the expiration of six months from the originally proposed effective date of said schedule, the public utility affected may place the filed schedule of rates in effect, pending expiration of such twelve months' suspension period, upon furnishing the commission with a bond in such form and with such sureties, if any, as the commission may determine, to secure the repayment to the customers of the public utility of the difference, if any, between the amounts collected under said schedule of rates and the schedule of rates determined by the commission to be just and reasonable.

N.H. Rev. Stat. Ann. § 378:7 (1966):

Whenever the commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the rates, fares or charges demanded or collected, or proposed to be demanded or collected, by any public utility for service rendered or to be rendered are unjust or unreasonable, or that the regulations or practices of such public utility affecting such rates are unjust or unreasonable, or in any wise in violation of any provision of law, or that the maximum rates, fares or charges chargeable by any such public utility are insufficient, the commission shall determine the just and reasonable or lawful rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed, and shall fix the same by order to be served upon all public utilities by which such rates, fares and charges are thereafter to be observed. The commission shall be under no obligation to investigate any rate matter which it has investigated within a period of two years, but may do so within said period at its discretion.

NORTH CAROLINA PUBLIC UTILITIES ACT

N.C. Gen. Stat. § 62-2 (Supp. 1980):

Upon investigation, it has been determined that the rates, services and operations of public utilities as defined herein, are affected with the public interest and that the availability of an adequate and reliable supply of electric power and natural gas to the people, economy and government of North Carolina is a matter of public policy. It is hereby declared to be the policy of the State of North Carolina:

(1) To provide fair regulation of public utilities in the interest of the public;

(2) To promote the inherent advantage of regulated public utilities;

(3) To promote adequate, reliable and economical utility service to all of the citizens and residents of the State;

(4) To provide just and reasonable rates and charges for public utility services without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices and consistent with long-term management and conservation of energy resources by avoiding wasteful, uneconomic and inefficient uses of energy;

(4a) To assure that facilities necessary to meet future growth can be financed by the utilities operating in this State on terms which are reasonable and fair to both the customers and existing investors of such utilities; and to that end to authorize fixing of rates in such a manner as to result in lower costs of new facilities and lower rates over the operating lives of such new facilities by making provisions in the rate-making process for the investment of public utilities in plant under construction;

(5) To encourage and promote harmony between public utilities, their users and the environment;

(6) To foster the continued service of public utilities on a well-planned and coordinated basis that is consistent with the

level of energy needed for the protection of public health and safety and for the promotion of the general welfare as expressed in the State energy policy;

(7) To seek to adjust the rate of growth of regulated energy supply facilities serving the State to the policy requirements of statewide development; and

(8) To cooperate with other states and with the federal government in promoting and coordinating interstate and intrastate public utility service and reliability of public utility energy supply.

To these ends, therefore, authority shall be vested in the North Carolina Utilities Commission to regulate public utilities generally, their rates, services and operations, and their expansion in relation to long-term energy conservation and management policies and statewide development requirements, and in the manner and in accordance with the policies set forth in this Chapter. Nothing in this Chapter shall be construed to imply any extension of Utilities Commission regulatory jurisdiction over any industry or enterprise that is not subject to the regulatory jurisdiction of said Commission.

N.C. Gen. Stat. § 62-3 (1978):

As used in this Chapter, unless the context otherwise requires, the term:

(1) "Broker," with regard to motor carriers of passengers, means any person not included in the term "motor carrier" and not a bona fide employee or agent of any such carrier, who or which as principal or agent engages in the business of selling or offering for sale any transportation of passengers by motor carrier, or negotiates for or holds himself, or itself, out by solicitation, advertisements, or otherwise, as one who sells, provides, furnishes, contracts, or arranges for such transportation for compensation, either directly or indirectly.

(2) "Certificate" means a certificate of public convenience and necessity issued by the Commission pursuant to the provisions of this Chapter to a public utility.

(3) "Certified mail" means such mail only when a return receipt is requested.

(4) "Charter party," with regard to motor carriers, means a group of persons who, pursuant to a common purpose and under a single contract, and at a fixed charge for the vehicle in accordance with the carrier's tariff, lawfully on file with the Commission, have acquired the exclusive use of a passenger-carrying motor vehicle to travel together as a group from a point of origin to a specified destination or for a particular intinerary, either agreed upon in advance or modified by the chartering group after having left the place of origin.

(5) "Commission" means the North Carolina Utilities Commission.

(6) "Common carrier" means any person which holds itself out to the general public to engage in transportation of persons or property for compensation, including transportation by train, bus, truck, boat or other conveyance, except as exempted in G.S. 62-260.

(7) "Common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in intrastate commerce of persons or property or any class or classes thereof for compensation, whether over regular or irregular routes, except as exempted in G.S. 62-260.

(8) "Contract carrier by motor vehicle" means any person which, under an individual contract or agreement with another person and with such additional persons as may be approved by the Utilities Commission, engages in the transportation other than the transportation referred to in subdivision (7) of this section, by motor vehicle of persons or property in intrastate commerce for compensation, except as exempted in G.S. 62-260.

(9) "Contract carrier" means any person which under an individual contract or agreement with another person and with such additional persons as may be approved by the Utilities Commission, engages in the transportation of persons

or property for compensation, except as exempted in G.S. 62-260.

(10) "Foreign commerce" means commerce between any place in the United States and any place in a foreign country, or between places in the United States through any foreign country.

(11) "Franchise" means the grant of authority by the Commission to any person to engage in business as a public utility or contract carrier, whether or not exclusive or shared with others or restricted as to terms and conditions and whether described by area or territory or not, and includes certificates and permits, and all other forms of licenses or orders and decisions granting such authority.

(12) "Highway" means any road or street in this State used by the public or dedicated or appropriated to public use.

(13) "Industrial plant" means any plant, mill, or factory engaged in the business of manufacturing.

(14) "Interstate commerce" means commerce between any place in a state and any place in another state or between places in the same state through another state.

(15) "Intrastate commerce" means commerce between points and over a route or within a territory wholly within this State, which commerce is not a part of a prior or subsequent movement to or from points outside of this State in interstate or foreign commerce, and includes all transportation within this State for compensation in interstate or foreign commerce which has been exempted by Congress from federal regulation.

(16) "Intrastate operations" means the transportation of persons or property for compensation in intrastate commerce.

(17) "Motor carrier" means both a common carrier by motor vehicle and a contract carrier by motor vehicle.

(18) "Motor vehicle" means any vehicle, machine, tractor, semi-trailer, or any combination thereof, which is propelled or drawn by mechanical power and used upon the highways within the State.

(19) "Municipality" means any incorporated community, whether designated in its charter as a city, town, or village.

(20) "Permit" means a permit issued by the Commission pursuant to the provisions of this Chapter to a contract carrier by motor vehicle.

(21) "Person" means a corporation, individual, copartnership, company, association, or any combination of individuals or organizations doing business as a unit, and includes any trustee, receiver, assignee, lessee, or personal representative thereof.

(22) "Private carrier" means any person not included in the definitions of common carrier or contract carrier, which transports in intrastate commerce in its own vehicle or vehicles property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or when such transportation is purely an incidental adjunct to some other established private business owned and operated by such person other than the transportation of property for compensation.

(23) a. "Public utility" means a person, whether organized under the laws of this State or under the laws of any other state or country, now or hereafter owning or operating in this State equipment or facilities for:

1. Producing, generating, transmitting, delivering or furnishing electricity, piped gas, steam or any other like agency for the production of light, heat or power to or for the public for compensation;

2. Diverting, developing, pumping, impounding, distributing or furnishing water to or for the public for compensation, or operating a public sewerage system for compensation; provided, however, that the term "public utility" shall not include any person or company whose sole operation consists of selling water to less than 10 residential customers, except that any person or company which constructs a water system in a subdivision with plans for 10 or more lots and which holds itself out by contracts or other means at the time of said construction to serve an area containing more than 10 residential

building lots shall be a public utility at the time of such planning or holding out to serve such 10 or more building lots, without regard to the number of actual customers connected;

3. Transporting persons or property by street, suburban or interurban bus or railways for the public for compensation;

4. Transporting persons or property by railways or motor vehicles, or any other form of transportation or express service for the public for compensation, except motor carriers exempted in G.S. 62-260, and except carriers by air;

5. Transporting or conveying gas, crude oil or other fluid substance by pipeline for the public for compensation;

6. Conveying or transmitting messages or communications by telephone or telegraph, or any other means of transmission, where such service is offered to the public for compensation.

b. The term "public utility" shall for rate-making purposes include any person producing, generating or furnishing any of the foregoing services to another person for distribution to or for the public for compensation.

c. The term "public utility" shall include all persons affiliated through stock ownership with a public utility doing business in this State as parent corporation or subsidiary corporation as defined in G.S. 55-2 to such an extent that the Commission shall find that such affiliation has an effect on the rates or service of such public utility.

d. The term "public utility," except as otherwise expressly provided in this Chapter, shall not include a municipality, an authority organized under the North Carolina Water and Sewer Authorities Act, electric or telephone membership corporation or nonprofit water membership or consumer-owned corporations financed by the Farmers Home Administration, the United States Department of Housing and Urban Development, or any similar or successor federal financing agency, provided, that (i) any such financing administration, department or agency exercise

substantial control over and regulation of any such corporation's rates and terms and conditions of service, and (ii) the members or consumer-owners of any such corporation, pursuant to the corporation's articles of incorporation and bylaws, shall elect the governing board of the corporation; or any person not otherwise a public utility who furnishes such service or commodity only to himself, his employees or tenants when such service or commodity is not resold to or used by others; provided, however, that any person other than a nonprofit organization serving only its members, who distributes or provides utility service to his employees or tenants by individual meters or by other coin-operated devices with a charge for metered or coin-operated utility service shall be a public utility within the definition and meaning of this Chapter with respect to the regulation of rates and provisions of service rendered through such meter or coin-operated device imposing such separate metered utility charge. If any person conducting a public utility shall also conduct any enterprise not a public utility, such enterprise is not subject to the provisions of this Chapter.

e. The term "public utility" shall include the University of North Carolina insofar as said University supplies telephone service, electricity or water to the public for compensation from the University Enterprises defined in G.S. 116-41.1(9).

f. The term "public utility" shall include the Town of Pineville insofar as said town supplies telephone services to the public for compensation. The territory to be served by the Town of Pineville in furnishing telephone services, subject to the Public Utilities Act, shall include the town limits as they exist on May 8, 1973, and shall also include the area proposed to be annexed under the town's ordinance adopted May 3, 1971, until January 1, 1975.

(24) "Rate" means every compensation, charge, fare, tariff, schedule, toll, rental and classification, or any of them, demanded, observed, charged or collected by any public utility, for any service product or commodity offered by it to the public, and any rules, regulations, practices or contracts

affecting any such compensation, charge, fare, tariff, schedule, toll, rental or classification.

(25) "Route" means the course or way which is traveled; the road or highway over which motor vehicles operate.

(26) "Securities" means stock, stock certificates, bonds, notes, debentures, or other evidences of ownership or of indebtedness, and any assumption or guaranty thereof.

(27) "Service" means any service furnished by a public utility, including any commodity furnished as a part of such service and any ancillary service or facility used in connection with such service.

(28) The word "State" means the State of North Carolina; "state" means any state.

(29) "Town" means any unincorporated community or collection of people having a geographical name by which it may be generally known and is so generally designated.

(30) "Panel" means a panel of three commissioners, a division of the Utilities Commission authorized for the purpose of carrying out certain functions of the Commission.

N.C. Gen. Stat. § 62-3 (Supp. 1980):

As used in this Chapter, unless the context otherwise requires, the term:

(23) a. "Public utility" means a person, whether organized under the laws of this State or under the laws of any other state or country, now or hereafter owning or operating in this State equipment or facilities for:

1. Producing, generating, transmitting, delivering or furnishing electricity, piped gas, steam or any other like agency for the production of light, heat or power to or for the public for compensation; provided, however, that the term "public utility" shall not include persons who construct or operate an electric generating facility, the primary purpose of which facility is for such person's own use and not for the primary purpose of producing

electricity, heat, or steam for sale to or for the public for compensation.

2. Diverting, developing, pumping, impounding, distributing or furnishing water to or for the public for compensation, or operating a public sewerage system for compensation; provided, however, that the term "public utility" shall not include any person or company whose sole operation consists of selling water to less than 10 residential customers, except that any person or company which constructs a water system in a subdivision with plans for 10 or more lots and which holds itself out by contracts or other means at the time of said construction to serve an area containing more than 10 residential building lots shall be a public utility at the time of such planning or holding out to serve such 10 or more building lots, without regard to the number of actual customers connected;

3. Transporting persons or property by street, suburban or interurban bus or railways for the public for compensation;

4. Transporting persons or property by railways or motor vehicles, or any other form of transportation or express service for the public for compensation, except motor carriers exempted in G.S. 62-260, and except carriers by air;

5. Transporting or conveying gas, crude oil or other fluid substance by pipeline for the public for compensation;

6. Conveying or transmitting messages or communications by telephone or telegraph, or any other means of transmission, where such service is offered to the public for compensation.

b. The term "public utility" shall for rate-making purposes include any person producing, generating or furnishing any of the foregoing services to another person for distribution to or for the public for compensation.

c. The term "public utility" shall include all persons affiliated through stock ownership with a public utility doing business in this State as parent corporation or

subsidiary corporation as defined in G.S. 55-2 to such an extent that the Commission shall find that such affiliation has an effect on the rates or service of such public utility.

d. The term "public utility," except as otherwise expressly provided in this Chapter, shall not include a municipality, an authority organized under the North Carolina Water and Sewer Authorities Act, electric or telephone membership corporation or nonprofit water membership or consumer-owned corporations financed by the Farmers Home Administration, the United States Department of Housing and Urban Development, or any similar or successor federal financing agency, provided, that (i) any such financing administration, department or agency exercise substantial control over and regulation of any such corporation's rates and terms and conditions of service, and (ii) the members or consumer-owners of any such corporation, pursuant to the corporation's articles of incorporation and bylaws, shall elect the governing board of the corporation; or any person not otherwise a public utility who furnishes such service or commodity only to himself, his employees or tenants when such service or commodity is not resold to or used by others; provided, however, that any person other than a nonprofit organization serving only its members, who distributes or provides utility service to his employees or tenants by individual meters or by other coin-operated devices with a charge for metered or coin-operated utility service shall be a public utility within the definition and meaning of this Chapter with respect to the regulation of rates and provisions of service rendered through such meter or coin-operated device imposing such separate metered utility charge. If any person conducting a public utility shall also conduct any enterprise not a public utility, such enterprise is not subject to the provisions of this Chapter.

e. The term "public utility" shall include the University of North Carolina insofar as said University supplies telephone service, electricity or water to the public for compensation from the University Enterprises defined in G.S. 116-41.1(9).

f. The term "public utility" shall include the Town of Pineville insofar as said town supplies telephone services to the public for compensation. The territory to be served by the Town of Pineville in furnishing telephone services, subject to the Public Utilities Act, shall include the town limits as they exist on May 8, 1973, and shall also include the area proposed to be annexed under the town's ordinance adopted May 3, 1971, until January 1, 1975.

(27a) "Small power producer" means a person or corporation owning or operating an electrical power production facility with a power production capacity which, together with any other facilities located at the same site, does not exceed 80 megawatts of electricity and which depends upon renewable resources for its primary source of energy. For the purposes of this section, renewable resources shall mean: hydroelectric power. A small power producer shall not include persons primarily engaged in the generation or sale of electricity from other than small power production facilities.

N.C. Gen. Stat. § 62-12 (1978):

To facilitate the work of the Commission and for administrative purposes, the chairman of the Commission, with the consent and approval of the Commission, may organize the work of the Commission in several hearing divisions and operating departments and may designate a member of the Commission as the head of any division or divisions and assign to members of the Commission various duties in connection therewith. Subject to the provisions of the State Personnel Act (Article 2 of Chapter 143 of the General Statutes), the Commission shall prepare and adopt rules and regulations governing the personnel, departments or divisions and all internal affairs and business of the Commission.

N.C. Gen. Stat. § 62-20 (1978):

The Attorney General may intervene, when he deems it to be advisable in the public interest, in proceedings before the Commission on behalf of the using and consuming public,

including utility users generally and agencies of the State. The Attorney General may institute and originate proceedings before the Commission in the name of the State, its agencies or citizens, in matters within the jurisdiction of the Commission. The Attorney General may appear before such State and federal courts and agencies as he deems it advisable in matters affecting public utility services. In the performance of his responsibilities under this section, the Attorney General shall have the right to employ expert witnesses, and the compensation and expenses therefor shall be paid from the Contingency and Emergency Fund. The Commission shall furnish the Attorney General with copies of all applications, petitions, pleadings, order and decisions filed with or entered by the Commission. The Attorney General shall have access to all books, papers, studies, reports and other documents filed with the Commission.

N.C. Gen. Stat. § 62-23 (1978):

The Commission is hereby declared to be an administrative board or agency of the General Assembly created for the principal purpose of carrying out the administration and enforcement of this Chapter, and for the promulgation of rules and regulations and fixing utility rates pursuant to such administration; and in carrying out such purpose, the Commission shall assume the initiative in performing its duties and responsibilities in securing to the people of the State an efficient and economic system of public utilities in the same manner as commissions and administrative boards generally. In proceedings in which the Commission is exercising functions judicial in nature, it shall act in a judicial capacity as provided in G.S. 62-60. The Commission shall separate its administrative or executive functions, its rule making functions, and its functions judicial in nature to such extent as it deems practical and advisable in the public interest.

N.C. Gen. Stat. § 62-30 (1978):

The Commission shall have and exercise such general power and authority to supervise and control the public utilities of

the State as may be necessary to carry out the laws providing for their regulation, and all such other powers and duties as may be necessary or incident to the proper discharge of its duties.

N.C. Gen. Stat. § 62-31 (1978):

The Commission shall have and exercise full power and authority to administer and enforce the provisions of this Chapter, and to make and enforce reasonable and necessary rules and regulations to that end.

N.C. Gen. Stat. § 62-32 (1978):

(a) Under the rules herein prescribed and subject to the limitations hereinafter set forth, the Commission shall have general supervision over the rates charged and service rendered by all public utilities in this State.

(b) The Commission is hereby vested with all power necessary to require and compel any public utility to provide and furnish to the citizens of this State reasonable service of the kind it undertakes to furnish and fix and regulate the reasonable rates and charges to be made for such service.

N.C. Gen. Stat. § 62-33 (1978):

The Commission shall at all times keep informed as to the public utilities, their rates and charges for service, and the service supplied and the purposes for which it is supplied.

N.C. Gen. Stat. § 62-34 (1978):

(a) The Commission shall from time to time visit the places of business and investigate the books and papers of all public utilities to ascertain if all the orders, rules and regulations of the Commission have been complied with, and shall have full power and authority to examine all officers, agents and employees of such public utilities, and all other persons, under oath or otherwise, and to compel the production of papers

and the attendance of witnesses to obtain the information necessary for carrying into effect and otherwise enforcing the provisions of this Chapter.

(b) Members of the Commission, Commission staff, and public staff may during all reasonable hours enter upon any premises occupied by any public utility, for the purpose of making the examinations and tests and exercising any power provided for in this Article, and may set up and use on such premises any apparatus and appliances necessary therefor. Such public utility shall have the right to be represented at the making of such examinations, tests and inspections.

N.C. Gen. Stat. § 62-35 (1978):

(a) The Commission may establish a system of accounts to be kept by the public utilities under its jurisdiction, or may classify said public utilities and establish a system of accounts for each class, and prescribe the manner of keeping such accounts.

(b) The Commission may require any public utility under its jurisdiction to keep separate or allocate the revenue from and the cost of doing interstate and intrastate business in North Carolina.

(c) The Commission may ascertain, determine, and prescribe what are proper and adequate charges for depreciation of the several classes of property for each public utility. The Commission may prescribe such changes in such charges for depreciation as it finds necessary.

N.C. Gen. Stat. § 62-36 (1978):

The Commission may require any public utility to file annual reports in such form and of such content as the Commission may require and special reports concerning any matter about which the Commission is authorized to inquire or to keep informed, or which it is required to enforce. All reports shall be under oath when required by the Commission. The Commission may issue an order, without notice or hearing,

canceling or suspending any certificate of convenience and necessity 30 days after the date of service of the order for failing to file the required annual report at the time it was due. In the event the report is filed during the 30-day period, the order of cancellation or suspension shall be null and void.

N.C. Gen. Stat. § 62-37 (1978):

(a) The Commission may, on its own motion and whenever it may be necessary in the performance of its duties, investigate and examine the condition and management of public utilities or of any particular public utility. In conducting such investigation the Commission may proceed either with or without a hearing as it may deem best, but shall make no order without affording the parties affected thereby notice and hearing.

(b) If after such an investigation, or investigation and hearing, the Commission, in its discretion, is of the opinion that the public interest shall be served by an appraisal of any properties in question, the investigation of any particular construction, the audit of any accounts or books, the investigation of any contracts, or the practices, contracts or other relations between the public utility in question and any holding or finance agency with which such public utility may be affiliated, it shall be the duty of the Commission to report its findings and recommendation to the Governor and Council of State with request for an allotment from the Contingency and Emergency Fund to defray the expense thereof, which may be granted as provided by law for expenditures from such fund or may be denied. Provided, however, that the Commission is authorized to order any such appraisal, investigations, or audit to be undertaken by a competent, qualified, and independent firm selected by the Commission, the cost of such appraisal, investigation or audit to be borne by the public utility in question. Notwithstanding any other provisions of this Chapter, the Commission is authorized to initiate a full and complete management audit of any public utility company once every five years, by a competent, qualified, and independent firm, such audit to thoroughly examine the

efficiency and effectiveness of management decisions among other factors as directed by the Commission. The cost of such audit is to be borne by the particular public utility subject to the audit; provided, however, that carriers subject to regulation by and auditing of the Interstate Commerce Commission shall not be required to bear the expense of additional audit of accounts or management audit required hereunder.

N.C. Gen. Stat. § 62-38 (1978):

The Commission shall have the same power and authority to regulate the operation of privately owned public utilities within municipalities as it has to regulate such public utilities operating outside of municipalities, with the exception of the rights of such municipalities to grant franchises for such operation under G.S. 160-2, paragraph 6, and such public utilities shall be subject to the provisions of this Chapter in the same manner as public utilities operating outside municipalities.

N.C. Gen. Stat. § 62-39 (1978):

(a) The Commission, upon its own motion or upon petition of any public utility or upon petition of the North Carolina Rural Electrification Authority on behalf of any electric membership corporation, shall have the power and authority, after notice and hearing, to order that the lines and right-of-way of any public utility or electric membership corporation may be crossed by any other public utility or electric membership corporation. The Commission, in all such cases, may require any such crossings to be constructed and maintained in a safe manner and in accord with accepted and approved standards of safety and may prescribe the manner in which such construction shall be done.

(b) The Commission shall also have the power and authority to discontinue and prohibit such crossings where they are unnecessary and can reasonably be avoided and to order changes in existing crossings when deemed necessary.

(c) In all cases in which the Commission orders such

crossings to be made or changed and when the parties affected cannot agree upon the cost of the construction of such crossings or the damages to be paid to one of the parties for the privilege of crossing the lines of such party, it shall be the duty of the Commission to apportion the cost of such construction and to fix the damage, if any, to be paid and to apportion the damages, if any, among the parties in such manner as may be just and equitable.

(d) This section shall not be construed to limit the right of eminent domain conferred upon public utilities and electric membership corporations by the laws of this State or to limit the right and duty conferred by law with respect to crossing of railroads and highways or railroads crossing railroads, but the duty imposed and the remedy given by this section shall be in addition to other duties and remedies now prescribed by law. Any party shall have the right of appeal from any final order or decision or determination of the Commission as provided by law for appeals from orders or decisions or final determinations of the Commission.

N.C. Gen. Stat. § 62-40 (1978):

When a public utility embraced in this Chapter has a controversy with another person and all the parties to such controversy agree in writing to submit such controversy to the Commission as arbitrator, the Commission shall act as such, and after due notice to all parties interested shall proceed to hear the same, and its award shall be final. Such award in cases where land or an interest in land is concerned shall immediately be certified to the clerk of the superior court of the county or counties in which said land, or any part thereof, is situated, and shall by such clerk be docketed in the judgment docket for such county, and from such docketing shall have the same effect as a judgment of the superior court for such county. Parties may appear in person or by attorney before such arbitrator.

N.C. Gen. Stat. § 62-41 (1978):

The Commission may conduct a program of accident prevention and public safety covering all public utilities with

special emphasis on highway safety and transport safety and may investigate the causes of any accident on a railroad or highway involving a public utility, or any accident in connection with any other public utility. Any information obtained upon such investigation shall be reduced to writing and a report thereof filed in the office of the Commission, which shall be subject to public inspection but such report shall not be admissible in evidence in any civil or criminal proceeding arising from such accident. The Commission may adopt reasonable rules and regulations for the safety of the public as affected by public utilities and the safety of public utility employees. The Commission shall cooperate with and coordinate its activities for public utilities with similar programs of the Department of Motor Vehicles, the Insurance Department, the Industrial Commission and other organizations engaged in the promotion of highway safety and employee safety.

N.C. Gen. Stat. § 62–42 (1978):

(a) Whenever the Commission, after notice and hearing had upon its own motion or upon complaint, finds:

(1) The service of any public utility is inadequate, insufficient or unreasonably discriminatory, or

(2) That persons are not served who may reasonably be served, or

(3) That additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility, of any two or more public utilities ought reasonably to be made, or

(4) That it is reasonable and proper that new structures should be erected to promote the security or convenience or safety of its patrons, employees and the public, or

(5) That any other act is necessary to secure reasonably adequate service or facilities and reasonably and adequately to serve the public convenience and necessity,

The Commission shall enter and serve an order directing that such additions, extensions, repairs, improvements, or addi-

tional services or changes shall be made or affected within a reasonable time prescribed in the order. This section shall not apply to terminal or terminal facilities of motor carriers of property.

(b) If such order is directed to two or more public utilities, the utilities so designated shall be given such reasonable time as the Commission may grant within which to agree upon the portion or division of the cost of such additions, extensions, repairs, improvements or changes which each shall bear. If at the expiration of the time limited in the order of the Commission, the utility or utilities named in the order shall fail to file with the Commission a statement that an agreement has been made for division or apportionment of the cost or expense, the Commission shall have the authority, after further hearing in the same proceeding, to make an order fixing the portion of such cost or expense to be borne by each public utility affected and the manner in which the same shall be paid or secured.

(c) For the purpose of this section, "public utility" shall include any electric membership corporation operating within this State.

N.C. Gen. Stat. § 62-43 (1978):

(a) The Commission may, after notice and hearing, had upon its own motion or upon complaint, ascertain and fix just and reasonable standards, classifications, regulations, practices, or service to be furnished, imposed, observed or followed by any or all public utilities; ascertain and fix adequate and reasonable standards for the measurement of quantity, quality, pressure, initial voltage or other condition pertaining to the supply of the product, commodity or service furnished or rendered by any and all public utilities; prescribe reasonable regulations for the examination and testing of such product, commodity or service and for the measurement thereof; establish or approve reasonable rules, regulations, specifications and standards to secure the accuracy of all meters and appliances for measurement; and provide for the examination

and testing of any and all appliances used for the measurement of any product, commodity or service of any public utility.

(b) The Commission shall fix, establish and promulgate standards of quality and safety for gas furnished by a public utility and prescribe rules and regulations for the enforcement of and obedience to the same.

N.C. Gen. Stat. § 62–44 (1978):

The Commission may, upon its own motion or upon written complaint by any person, after notice and hearing, require any two or more telephone or telegraph utilities to establish and maintain through lines within the State between two or more localities, which cannot be communicated with or reached by the lines of either utility alone, where the lines or wires of such utilities form a continuous line of communication, or could be made to do so by the construction and maintenance of suitable connections or the joint use of equipment, or the transfer of messages at common points. The rate for such service shall be just and reasonable and the Commission shall have power to establish the same, and declare the portion thereof to which each utility affected thereby is entitled and the manner in which the same must be secured and paid. All necessary construction, maintenance and equipment in order to establish such service shall be constructed and maintained in such manner and under such rules, with such divisions of expense and labor, as may be required by the Commission.

N.C. Gen. Stat. § 62–45 (1978):

The Commission, after notice and hearing, may ascertain and fix the cost or value, or both, of the whole or any part of the property of any public utility insofar as the same is material to the exercise of the jurisdiction of the Commission, make revaluations from time to time, and ascertain the cost of all new construction, extensions and additions to the property of every public utility.

N.C. Gen. Stat. § 62–47 (1978):

Every municipality furnishing gas, electricity or telephone service shall make an annual report to the Commission, verified by the oath of the general manager or superintendent thereof, on the same forms as provided for reports of public utilities, giving the same information as required of public utilities.

N.C. Gen. Stat. § 62–48 (1978):

The Commission is authorized and empowered to initiate or appear in such proceedings before federal and State courts and agencies as in its opinion may be necessary to secure for the users of public utility service in this State just and reasonable rates and service; provided, however, that the Commission shall not appear in any State appellate court in support of any order or decision of the Commission entered in a proceeding in which a public utility had the burden of proof.

N.C. Gen. Stat. § 62–49 (1978):

The Commission is authorized and directed to secure publication of all North Carolina laws affecting public utilities, together with the Commission rules and regulations, in an annotated edition, and the Commission may adopt rules for distribution of said publication, and shall publish biennial supplements to said utilities laws containing all amendments and additions thereto, and may republish said laws at such times as may be reasonable and necessary.

N.C. Gen. Stat. § 62–51 (1978):

Members of the Commission, Commission staff, and public staff are hereby authorized to inspect the books and records of corporations affiliated with public utilities regulated by the Utilities Commission under the provisions of this Chapter, including parent corporations and subsidiaries of parent corporations. This authorization shall extend to all reasonably

necessary inspection of all books and records of account and agreements and transactions between public utilities doing business in North Carolina and their affiliated corporations where such records relate either directly or indirectly to the provision of intrastate service by the utility. The right to inspect such books and records shall apply both to books and records in the State of North Carolina and such books and records located outside of the State of North Carolina. If any such affiliated corporation shall refuse to permit such inspection of its books and records and its transactions with public utilities doing business in North Carolina, the Utilities Commission is empowered to order the public utility regulated in North Carolina to show cause why it should not secure from its affiliated corporation such books and records for inspection in North Carolina or why their franchise to operate as a public utility in North Carolina should not be cancelled.

N.C. Gen. Stat. § 62-60 (1978):

For the purpose of conducting hearings, making decisions and issuing orders, and in formal investigations where a record is made of testimony under oath, the Commission shall be deemed to exercise functions judicial in nature and shall have all the powers and jurisdiction of a court of general jurisdiction as to all subjects over which the Commission has or may hereafter be given jurisdiction by law. The commissioners and members of the Commission's staff designated and assigned as examiners shall have full power to administer oaths and to hear and take evidence. The Commission shall render its decisions upon questions of law and of fact in the same manner as a court of record. A majority of the commissioners shall constitute a quorum, and any order or decision of a majority of the commissioners shall constitute the order or decision of the Commission, except as otherwise provided in this Chapter.

N.C. Gen. Stat. § 62-60.1 (1978):

(a) The Utilities Commission shall sit in panels of three commissioners each unless the chairman by order shall set the proceeding for hearing by the full Commission.

(b) Any order or decision made unanimously by a panel of three commissioners shall constitute the order or decision of the Commission, except as otherwise provided in this Chapter; provided, however, that upon motion of any three commissioners not sitting on the panel, made within 10 days of issuance of such order or decision of the panel, with notice to parties of record, the order or decision of the panel shall thereby be stayed and the full Commission shall review the order or decision of the panel and shall within 30 days of said motion either affirm or modify the order or decision of the panel or remand the matter to the panel for further proceedings; provided that the foregoing shall not limit the right of parties to seek review of such order or decision under G.S. 62-90.

(c) In the event an order or decision of the panel of three is not made unanimously, such order or decision shall be a recommended order only, subject to review by the full Commission, with all commissioners eligible to participate in the final arguments and decision. Review shall take place in accordance with the provisions of G.S. 62-78 and the Commission shall decide the matter in controversy and make appropriate order or decision thereon within 60 days of the date of the recommended order. If within the filing period specified by the panel no exception has been filed by a party, or if the Commission within the same period has not advised the parties that it will conduct a review upon its own motion, the recommended order or decision shall become the final order or decision of the Commission. Nothing in this section shall amend or repeal the provisions of G.S. 62-134.

(d) This section shall become effective July 1, 1975, and shall not affect the utilization of or the procedures outlined for utilization of a hearing commissioner or a hearing examiner as provided for elsewhere in Chapter 62.

N.C. Gen. Stat. § 62-61 (1978):

The Commission shall have the same power to compel the attendance of witnesses, require the examination of persons and parties, and compel the production of books and papers,

and punish for contempt, as by law is conferred upon the superior courts.

N.C. Gen. Stat. § 62-62 (1978):

All subpoenas for witnesses to appear before the Commission, a division of the Commission or a hearing commissioner or examiner and notice to persons or corporations, shall be issued by the Commission or its chief clerk or a deputy clerk and be directed to any sheriff, constable or other officer authorized by law to serve process issued out of the superior courts, who shall execute the same and make due return thereof as directed therein, under the penalties prescribed by law for a failure to execute and return the process of any court. The Commission shall have the authority to require the applicant for a subpoena for persons and documents to make a reasonable showing that the evidence of such persons or documents will be material and relevant to the issue in the proceeding.

N.C. Gen. Stat. § 62-63 (1978):

The chief clerk, a deputy clerk, or any authorized agent of the Commission may serve any notice issued by it and his return thereof shall be evidence of said service; and it shall be the duty of the sheriffs and all officers authorized by law to serve process issuing out of the superior courts, to serve any process, subpoenas and notices issued by the Commission, and such officers shall be entitled to the same fees as are prescribed by law for serving similar papers issuing from the superior court. Service of notice of all hearings, investigations and proceedings by the Commission may be made upon any person upon whom a summons may be served in accordance with the provisions governing civil actions in the superior courts of this State, and may be made personally by an authorized agent of the Commission or by mailing in a sealed envelope, registered, with postage prepaid, or by certified mail.

N.C. Gen. Stat. § 62-64 (1978):

All bonds or undertakings required to be given by any of the provisions of this Chapter shall be payable to the State of North Carolina, and may be sued on as are other undertakings which are payable to the State.

N.C. Gen. Stat. § 62-65 (1978):

(a) When acting as a court of record, the Commission shall apply the rules of evidence applicable in civil actions in the superior court, insofar as practicable, but no decision or order of the Commission shall be made or entered in any such proceeding unless the same is supported by competent material and substantial evidence upon consideration of the whole record. Oral evidence shall be taken on oath or affirmation. The rules of privilege shall be effective to the same extent that they are now or hereafter recognized in civil actions in the superior court. The Commission may exclude incompetent, irrelevant, immaterial and unduly repetitious or cumulative evidence. All evidence, including records and documents in the possession of the Commission of which it desires to avail itself, shall be made a part of the record in the case by definite reference thereto at the hearing. Any party introducing any document or record in evidence by reference shall bear the expense of all copies required for the record in the event of an appeal from the Commission's order. Every party to a proceeding shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses on any matter relevant to the issues, to impeach any witness regardless of which party first called such witness to testify and to rebut the evidence against him. If a party does not testify in his own behalf, he may be called and examined as if under cross-examination.

(b) The Commission may take judicial notice of its decisions, the annual reports of public utilities on file with the Commission, published reports of federal regulatory agencies, the decisions of State and federal courts, State and federal statutes, public information and data published by official State and federal agencies and reputable financial reporting

services, generally recognized technical and scientific facts within the Commission's specialized knowledge, and such other facts and evidence as may be judicially noticed by justices and judges of the General Court of Justice. When any Commission decision relies upon such judicial notice of material facts not appearing in evidence, it shall be so stated with particularity in such decision and any party shall, upon petition filed within 10 days after service of the decision, be afforded an opportunity to contest the purported facts noticed or show to the contrary in a rehearing set with proper notice to all parties; but the Commission may notify the parties before or during the hearing of facts judicially noticed, and afford at the hearing a reasonable opportunity to contest the purported facts noticed, or show to the contrary.

N.C. Gen. Stat. § 62-66 (1978):

The Commission or any party to a proceeding may take and use depositions of witnesses in the same manner as provided by law for the taking and use of depositions in civil actions in the superior court.

N.C. Gen. Stat. § 62-67 (1978):

Any party to a proceeding may make application to the Commission for examination of any other party before hearing. The Commission, if it finds good cause therefor, shall issue the order for such examination, and the deposition taken thereunder shall be filed with the Commission's chief clerk, in accordance with and subject to the procedure prescribed for such examinations in the superior court. In cases in which the Commission is a party, it may order such examination upon its own motion, upon the affidavit of any member of the Commission's staff. The Commission may adopt rules for the taking of such examinations.

N.C. Gen. Stat. § 62–68 (1978):

At any time, 10 or more days prior to a hearing or a continued hearing, any party or the Commission may send

by registered or certified mail or deliver to the opposing parties a copy of any affidavit proposed to be used in evidence, together with the notice as herein provided. Unless an opposing party or the Commission at least five days prior to the hearing, if the affidavit and notice are received at least 20 days prior to such hearing, otherwise at any time prior to or during such hearing, sends by registered or certified mail or delivers to the proponent a request to cross-examine the affiant at the hearing, the right to cross-examine such affiant is waived and the affidavit, if introduced in evidence, shall be given the same effect as if the affiant had testified orally. If an opportunity to cross-examine an affiant at the hearing is not afforded after request therefor is made as herein provided, the affidavit shall not be received in evidence. The notice accompanying the affidavit shall set forth the name and address of the affiant and shall contain a statement that the affiant will not be called to testify orally and will not be subject to cross-examination unless the opposing parties or the Commission demand the right of cross-examination by notice mailed or delivered to the proponent at least five days prior to the hearing if the notice and affidavit are received at least 20 days prior to such hearing, otherwise at any time prior to or during such hearing.

N.C. Gen. Stat. § 62–69 (1978):

(a) In all contested proceedings the Commission, by prehearing conferences and in such other manner as it may deem expedient and in the public interest, shall encourage the parties and their counsel to make and enter stipulations of record for the following purposes:

(1) Eliminating the necessity of proof of all facts which may be admitted and the authenticity of documentary evidence,

(2) Facilitating the use of exhibits, and

(3) Clarifying the issues of fact and law.

The Commission may make informal disposition of any contested proceeding by stipulation, agreed settlement, consent order or default.

(b) Unless otherwise provided in the Commission's rules of practice and procedure, such prehearing conferences may be ordered by the Commission or requested by any party to a proceeding in substantially the same manner, and with substantially the same subsequent procedure, as provided by law for the conduct of pretrial hearings in the superior court.

N.C. Gen. Stat. § 62–70 (1978 & Supp. 1980):

(a) In all matters and proceedings pending on the Commission's formal docket, with adversary parties of record, all communications or contact of any nature whatsoever between any party and the Commission or any of its members, or any hearing examiner assigned to such docket, whether verbal or written, formal or informal, which pertains to the merits of such matter or proceeding, shall be made only with full knowledge of, or notice to, all other parties of record. All parties shall have an opportunity to be informed fully as to the nature of such communication and to be present and heard with respect thereto. In all matters and proceedings which are judicial in nature, it is the specific intent of this section that all members of the Commission shall conduct all trials, hearings and proceedings before them in the manner and in accordance with the judicial standards applicable to judges of the General Court of Justice, as provided in Chapter 7A of the General Statutes, and upon the initiation of any such proceedings, and particularly during the trial or hearing thereof, there shall be no communications or contacts of any nature, including telephone communications, written correspondence, or direct office conferences, between any party or such party's attorney and any member of the Commission or any hearing examiner, without all other parties to such proceeding having full notice and opportunity to be present and heard with respect to any such contact or communication.

Any commissioner who knowingly receives any such communication or contact during such proceeding and who fails promptly to report the same to the Attorney General, or who

otherwise violates any of the provisions of this subsection shall be liable to impeachment. Any examiner who knowingly receives any such communication or contact during such proceeding and who fails promptly to report the same to the Attorney General or who otherwise violates any of the provisions of this subsection shall be subject to dismissal from employment for cause.

(b) In the event any such communication or contact shall be received by the Commission or any commissioner or any hearing examiner assigned to such docket without such knowledge or notice to all other parties, the Commission shall immediately cause a formal record of such violation to be made in its docket and thereafter no ruling or decision shall be made in favor of such violating party until the aggrieved party shall waive such violation or the Commission shall find as a fact that such party was not prejudiced thereby or that any such prejudice, if present, has been removed.

(c) Any contacts or communications made in violation of this section which are not recorded by the Commission may be recorded by notice to the Commission by any aggrieved party and, unless the Commission shall find that such violation did not in fact occur, such recording shall have the same effect as if done by the Commission.

(d) In matters not under this section, the Commission may secure information and receive communications ex parte, it being the purpose of this section to protect adversary interests where they exist but not otherwise to restrict unduly the administrative and legislative functions of the Commission.

(e) This section shall not modify any notice required in the case of pleadings and proceedings which are subject to other requirements of notice to parties of record, whether by statute or by rule of the Commission, and the Commission may adopt reasonable rules to coordinate this section with such other requirements.

(f) In addition to the foregoing provisions regarding contacts with members of the Commission and hearing examiners,

if any party of record, including the assistant attorney general when he is a party, confers with or otherwise contacts any staff personnel employed by the Commission regarding the merits of a pending proceeding, the staff employee shall promptly forward by regular mail a memorandum of the date and general subject matter of such contact to all other parties of record to the proceeding.

(g) Notwithstanding the foregoing, no communication by a public utility or by the public staff regarding the level of rates specifically proposed to be charged by a public utility shall be made or directed to the Commission, a member of the Commission, or hearing examiner, except in the form of written tariff, petition, application, pleading, written response, written recommendation, recorded conference, intervention, answer, pleading, sworn testimony and related exhibits, oral argument on the record, or brief. Willful violations of the provisions of this section on the part of any public utility shall subject such public utility to the penalties provided in G.S. 62-310(a). Willful violations of the provisions of this section by a member of the public staff shall subject such person to dismissal for cause.

N.C. Gen. Stat. § 62–71 (1978):

(a) All formal hearings before the Commission, a panel of three commissioners, a commissioner or an examiner shall be public, and shall be conducted in accordance with such rules as the Commission may prescribe. A full and complete record shall be kept of all proceedings on any formal hearing, and all testimony shall be taken by a reporter appointed by the Commission. Any party to a proceeding shall be entitled to a copy of the record or any part thereof upon the payment of the reasonable cost thereof as determined by the Commission.

(b) The Commission in its discretion may approve stenographic or mechanical methods of recording testimony, or a combination of such methods, and a transcript of any such

record shall be valid for all purposes, subject to protest and settlement by the Commission.

(c) The Commission is authorized to provide daily transcripts of testimony in cases of substantial public interest and in other cases where time is an important factor to the parties involved.

N.C. Gen. Stat § 62–73 (1978):

Complaints may be made by the Commission on its own motion or by any person having an interest, either direct or as a representative of any persons having a direct interest in the subject matter of such complaint by petition or complaint in writing setting forth any act or thing done or omitted to be done by any public utility, including any rule, regulation or rate heretofore established or fixed by or for any public utility in violation of any provision of law or of any order or rule of the Commission, or that any rate, service, classification, rule, regulation or practice is unjust and unreasonable. Upon good cause shown and in compliance with the rules of the Commission, the Commission shall also allow any such person authorized to file a complaint, to intervene in any pending proceeding. The Commission, by rule, may prescribe the form of complaints filed under this section, and may in its discretion order two or more complaints dealing with the same subject matter to be joined in one hearing. Unless the Commission shall determine, upon consideration of the complaint or otherwise, and after notice to the complainant and opportunity to be heard, that no reasonable ground exists for an investigation of such complaint, the Commission shall fix a time and place for hearing, after reasonable notice to the complainant and the utility complained of, which notice shall be not less than 10 days before the time set for such hearing.

N.C. Gen. Stat. § 62–76 (1978):

(a) Except as otherwise provided in this Chapter, any matter requiring a hearing shall be heard and decided by the

Commission or shall be referred to a panel of three commissioners or one of the commissioners or a qualified member of the Commission staff as examiner for hearing, report and recommendation of an appropriate order or decision thereon. Subject to the limitations prescribed in this Article, a panel of three commissioners, hearing commissioner or examiner to whom a hearing has been referred by order of the chairman shall have all the rights, duties, powers and jurisdiction conferred by this Chapter upon the Commission. The chairman, in his discretion, may direct any hearing by the Commission or any panel, commissioner or examiner to be held in such place or places within the State as he may determine to be in the public interest and as will best serve the convenience of interested parties. Before any member of the Commission staff enters upon the performance of duties as an examiner, he shall first take, subscribe to and file with the Commission an oath similar to the oath required of members of the Commission.

(b) Repealed by Session Laws 1975, c. 243, s. 5.

(c) In all cases in which a pending proceeding shall be assigned to a hearing commissioner, such commissioner shall hear and determine the proceedings and submit his recommended order, but, in the event of a petition to the full Commission to review such recommended order, the hearing commissioner shall take no part in such review, either in hearing oral argument or in consideration of the Commission's decision, but his vote shall be counted in such decision to affirm his original order.

N.C. Gen. Stat. § 62-77 (1978):

Any report, order or decision made or recommended by a panel of three commissioners, commissioner or examiner with respect to any matter referred for hearing shall be in writing and shall set forth separately findings of fact and conclusions of law and shall be filed with the Commission. A copy of such recommended order, report and findings shall be served upon the parties who have appeared in the proceeding.

N.C. Gen. Stat. § 62–80 (1978):

The Commission may at any time upon notice to the public utility and to the other parties of record affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend any order or decision made by it. Any order rescinding, altering or amending a prior order or decision shall, when served upon the public utility affected, have the same effect as is herein provided for original orders or decisions.

N.C. Gen. Stat. § 62–90 (1978):

(a) No party to a proceeding before the Commission may appeal from any final order or decision of the Commission unless within 30 days after the entry of such final order or decision, of within such time thereafter as may be fixed by the Commission, by order made within 30 days, the party aggrieved by such decision or order shall file with the Commission notice of appeal and exceptions which shall set forth specifically the ground or grounds on which the aggrieved party considers said decision or order to be unlawful, unjust, unreasonable or unwarranted, and including errors alleged to have been committed by the Commission.

(b) Any party may appeal from all or any portion of any final order or decision of the Commission in the manner herein provided. Copy of the notice of appeal shall be mailed by the appealing party at the time of filing with the Commission, to each party to the proceeding to the addresses as they appear in the files of the Commission in the proceeding. The failure of any party, other than the Commission, to be served with or to receive a copy of the notice of appeal shall not affect the validity or regularity of the appeal.

(c) The Commission may on motion of any party to the proceeding or on its own motion set the exceptions to the final order upon which such appeal is based for further hearing before the Commission.

(d) The appeal shall lie to the Court of Appeals as provided in G.S. 7A-29. The procedure for the appeal shall be as provided by the rules of appellate procedure.

(e), (f) Repealed by Session Laws 1975, c. 391, s. 12, effective July 1, 1975.

(g) The Court of Appeals shall hear and determine all matters arising on such appeal, as in this Article provided, and may in the exercise of its discretion assign the hearing of said appeal to any panel of the Court of Appeals.

N.C. Gen. Stat. § 62-95 (1978):

Pending judicial review, the Commission is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, a judge of the Court of Appeals is authorized to issue all necessary and appropriate process to postpone the effective date of any action by the Commission or take such action as may be necessary to preserve status or rights of any of the parties pending conclusion of the proceedings on appeal. The court may require the applicant for such stay to post adequate bond as required by the court.

N.C. Gen. Stat. § 62-96 (1978):

In all appeals heard in the Court of Appeals, any party may file a motion for review in the Supreme Court of the decision of the Court of Appeals under G.S. 7A-31, and in cases entitled to be appealed as a matter of right under G.S. 7A-30(3) any party may appeal to the Supreme Court from the decision of the Court of Appeals under the same rules and regulations as are prescribed by law for appeals, except that the Commission, if it shall appeal, shall not be required

to give any undertaking or make any deposit to assure the cost of such appeal, and such court may advance the cause on its docket.

N.C. Gen. Stat. § 62–110 (1978):

No public utility shall hereafter begin the construction or operation of any public utility plant or system or acquire ownership or control thereof, either directly or indirectly, without first obtaining from the Commission a certificate that public convenience and necessity requires, or will require, such construction, acquisition, or operation: Provided, that this section shall not apply to construction into territory contiguous to that already occupied and not receiving similar service from another public utility, nor to construction in the ordinary conduct of business.

N.C. Gen. Stat. § 62–111 (1978):

(a) No franchise now existing or hereafter issued under the provisions of this Chapter other than a franchise for motor carriers of passengers shall be sold, assigned, pledged or transferred, nor shall control thereof be changed through stock transfer or otherwise, or any rights thereunder leased, nor shall any merger or combination affecting any public utility be made through acquisition or control by stock purchase or otherwise, except after application to and written approval by the Commission, which approval shall be given if justified by the public convenience and necessity. Provided, that the above provisions shall not apply to regular trading in listed securities on recognized markets.

(b) No certificates or permits issued under the provisions of this Chapter for motor carriers of passengers shall be sold, assigned, pledged, transferred, or control changed through stock transfer or otherwise, or any rights thereunder leased, nor shall any merger or combination affecting any motor carrier of passengers be made through acquisition of control by stock purchases or otherwise, except after application to and written approval by the Commission as in this section

provided, provided that the above provisions shall not apply to regular trading in listing securities on recognized markets. The applicant shall give not less than 10 days' written notice of such application by registered mail or by certified mail to all connecting and competing carriers. When the Commission is of the opinion that the transaction is consistent with the purposes of this Chapter, the Commission may, in the exercise of its discretion, grant its approval, provided, however, that when such transaction will result in a substantial change in the service and operations of any motor carrier of passengers party to the transaction, or will substantially affect the operations and services of any other motor carrier, the Commission shall not grant its approval except upon notice and hearing as required in G.S. 62-262 upon an application for an original certificate or permit. In all cases arising under this subsection it shall be the duty of the Commission to require the successor carrier to satisfy the Commission that the operating debts and obligations of the seller, assignor, pledgor, lessor or transferor, including taxes due the State of North Carolina or any political subdivision thereof are paid or the payment thereof is adequately secured. The Commission may attach to its approval of any transaction arising under this section such other conditions as the Commission may determine are necessary to effectuate the purposes of this Article.

(c) No sale of a franchise for a motor carrier of property shall be approved by the Commission until the seller shall have filed with the Commission a statement under oath of all debts and claims against the seller, of which such seller has any knowledge or notice, (i) for gross receipts, use or privilege taxes due or to become due the State, as provided in the Revenue Act, (ii) for wages due employees of the seller, other than salaries of officers and in the case of motor carriers, (iii) for unremitted c.o.d. collections due shippers, (iv) for loss of or damage to goods transported, or received for transportation, (v) for overcharges on property transported, and, (vi) for interline accounts due other carriers, together with a bond, if required by the Commission, payable to the State, executed by a surety company authorized to do business in

the State, in an amount double the aggregate of all such debts and claims conditioned upon the payment of the same within the amount of such bond as the amounts and validity of such debts and claims are established by agreement of the parties, or by judgment. This subsection shall not be applicable to sales by personal representatives of deceased or incompetent persons, receivers or trustees in bankruptcy under court order.

(d) No person shall obtain a franchise for the purpose of transferring the same to another, and an offer of such transfer within one year after the same was obtained shall be prima facie evidence that such certificate or permit was obtained for the purpose of sale.

(e) The Commission shall approve applications for transfer of motor carrier franchises made under this section upon finding that said sale, assignment, pledge, transfer, change of control, lease, merger, or combination is in the public interest, will not adversely affect the service to the public under said franchise, will not unlawfully affect the service to the public by other public utilities, that the person acquiring said franchise or control thereof is fit, willing and able to perform such service to the public under said franchise, and that service under said franchise has been continuously offered to the public up to the time of filing said application or in lieu thereof that any suspension of service exceeding 30 days has been approved by the Commission as provided in G.S. 62–112(b)(5).

N.C. Gen. Stat. § 62-112 (1978):

(a) Franchises shall be effective from the date issued unless otherwise specified therein, and shall remain in effect until terminated under the terms thereof, or until suspended or revoked as herein provided.

(b) Any franchise may be suspended or revoked, in whole or in part, in the discretion of the Commission, upon application of the holder thereof; or, after notice and hearing, may be suspended or revoked, in whole or in part, upon complaint,

or upon the Commission's own initiative, for wilful failure to comply with any provision of this Chapter, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition or limitation of such franchise; provided, however, that any such franchise may be suspended by the Commission upon notice to the holder or lessee thereof without a hearing for any one or more of the following causes:

(1) For failure to provide and keep in force at all times security, bond, insurance or self-insurance for the protection of the public as required in G.S. 62-268 of this Chapter.

(2) For failure to file and keep on file with the Commission applicable tariffs or schedules of rates as required in this Chapter.

(3) For failure to pay any gross receipts, use or privilege taxes due the State of North Carolina within 30 days after demand in writing from the agency of the State authorized by law to collect the same; provided, that this subdivision shall not apply to instances in which there is a bona fide controversy as to tax liability.

(4) For failure for a period of 60 days after execution to pay any final judgment rendered by a court of competent jurisdiction against any holder or lessee of a franchise for any debt or claim specified in G.S. 62-111(b) and (c).

(5) For failure to begin operations as authorized by the Commission within the time specified by order of the Commission, or for suspension of authorized operations for a period of 30 days without the written consent of the Commission, save in the case of involuntary failure or suspension brought about by compulsion upon the franchise holder or lessee.

(c) The failure of a common carrier or contract carrier of passengers or property by motor vehicles to perform any transportation for compensation under the authority of its certificate or permit for a period of 30 consecutive days shall be prima facie evidence that said franchise is dormant and the public convenience and necessity is no longer served by such common carrier certificate or that the needs of a contract shipper are no longer served by such a contract carrier. Upon

finding after notice and hearing that no such service has been performed for a period of 30 days the Commission is authorized to find that the franchise is dormant and to cancel the certificate or permit of such common or contract carrier. The Commission in its discretion may give consideration in finding to other factors affecting the performance of such service, including seasonal requirements of the passengers or commodities authorized to be transported, the efforts of the carrier to make its services known to the public or to its contract shipper, the equipment and other facilities maintained by the carrier for performance of such service, and the means by which such carrier holds itself out to perform such service. A proceeding may be brought under this section by the Commission on its own motion or upon the complaint of any shipper or any other carrier. The franchise of a motor carrier may be canceled under the provisions of this section in any proceeding to sell or transfer or otherwise change control of said franchise brought under the provisions of G.S. 62-111, upon finding of dormancy as provided in this section. Any motor carrier who has obtained authority to suspend operations under the provisions of G.S. 62-112(b)(5) and the rules of the Utilities Commission issued thereunder shall not be subject to cancellation of its franchise under this section during the time such suspension of operations is authorized. In determining whether such carrier has made reasonable efforts to perform service under said franchise the Commission may in its discretion give consideration to disabilities of the carrier including death of the owner and physical disabilities.

N.C. Gen. Stat. § 62-113 (1978):

Each franchise shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, a motor carrier or other public utility is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the privileges granted by the franchise such reasonable terms, conditions, and limitations

as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of a carrier, and such terms and conditions as are necessary to carry out with respect to the operations of a carrier or other public utility, the requirements established by the Commission under this Chapter, provided, however, that no terms, conditions, or limitations shall restrict the right of a motor carrier of property only to add to its equipment and facilities over the routes, between the termini, or within the territory specified in the franchises, as the development of the business and the demands of the public shall require.

N.C. Gen. Stat. § 62-116 (1978):

(a) Upon the filing of an application in good faith for a franchise, the Commission may in its discretion, after notice by regular mail to all persons holding franchises authorizing similar services within the same territory and upon a finding that no other adequate existing service is available, pending its final decision on the application issue to the applicant appropriate temporary authority to operate under such just and reasonable conditions and limitations as the Commission deems necessary or desirable to impose in the public interest; provided, however, that pending such final decision on the application, the applicant shall comply with all the provisions of this Chapter, and with the lawful orders, rules and regulations of the Commission promulgated thereunder, applicable to holders of franchises, and upon failure of any applicant so to do, after reasonable notice from the Commission requiring compliance therewith in the particulars set out in the notice, and after hearing, the application may be dismissed by the Commission without further proceedings, and temporary authority issued to such applicant may be revoked. The authority granted under this section shall not create any presumption nor be considered in the action on the permanent authority application.

(b) Upon its own initiative, or upon written request by any customer or by any representative of a local or State govern-

ment agency, and after issuance of notice to the owner and operator and after hearing in accordance with G.S. 1A-1 Rule 65(b), the Commission may grant emergency operating authority to any person to furnish water or sewer utility service to meet an emergency to the extent necessary to relieve the emergency; provided, that the Commission shall find from such request, or from its own knowledge, that a real emergency exists and that the relief authorized is immediate, pressing and necessary in the public interest, and that the person so authorized has the necessary ability and is willing to perform the prescribed emergency service. Upon termination of the emergency, the emergency operating authority so granted shall expire upon order of the Commission. An emergency is defined herein as the imminent danger of losing adequate water or sewer utility service or the actual loss thereof.

N.C. Gen. Stat. § 62-118 (1978):

(a) Upon finding that public convenience and necessity are no longer served, or that there is no reasonable probability of a public utility realizing sufficient revenue from a service to meet its expenses, the Commission shall have power, after petition and notice, to authorize by order any public utility to abandon or reduce such service. Upon request from any party having an interest in said utility service, the Commission shall hold a public hearing on such petition, and may on its own motion hold a public hearing on such petition. Provided, however, that abandonment or reduction of service of motor carriers shall not be subject to this section, but shall be authorized only under the provisions of G.S. 62-262(k).

(b) If any person or corporation furnishing water or sewer utility service under this Chapter shall abandon such service without the prior consent of the Commission, and the Commission subsequently finds that such abandonment of service causes an emergency to exist, the Commission may, unless the owner or operator of the affected system consents, apply in accordance with G.S. 1A-1, Rule 65, to the resident superior court judge of any judicial district, where such person or

corporation operates, or to any superior court judge holding court in such judicial district, for an order restricting the lands, facilities and rights-of-way used in furnishing said water or sewer utility service to continued use in furnishing said service during the period of the emergency. An emergency is defined herein as the imminent danger of losing adequate water or sewer utility service or the actual loss thereof. The court shall have jurisdiction to restrict the lands, facilities, and rights-of-way to continued use in furnishing said water or sewer utility service by appropriate order restraining their being placed to other use, or restraining their being prevented from continued use in furnishing said water or sewer utility service, by any person, corporation, or their represenatives. The court may, in its discretion, appoint an emergency operator to assure the continued operation of such water or sewer utility service. The court shall have jurisdiction to require that reasonable compensation be paid to the owner, operator or other party entitled thereto for the use of any lands, facilities, and rights-of-way which are so restricted to continued use for furnishing water or sewer utility service during the period of the emergency and it may require the emergency operator of said lands, facilities, and rights-of-way to post bond in an amount required by the court. In no event shall such compensation, for each month awarded, exceed the net average monthly income of the utility for the 12-month period immediately preceding the order restricting use.

(c) Whenever the Commission, upon complaint or investigation upon its own motion, finds that the facilities being used to furnish water or sewer utility service are inadequate to such an extent that an emergency (as defined in G.S. 62-118(b) above) exists, and further finds that there is no reasonable probability of the owner operator of such utility obtaining the capital necessary to improve or replace the facilities from sources other than the customers, the Commission shall have the power, after notice and hearing, to authorize by order that such service be abandoned or reduced to those customers who are unwilling or unable to advance their fair share of the capital necessary for such improve-

ments. The amount of capital to be advanced by each customer shall be subject to approval by the Commission, and shall be advanced under such conditions as will enable each customer to retain a proprietary interest in the system to the extent of the capital so advanced. The remedy prescribed in this subsection is in addition to other remedies prescribed by law.

N.C. Gen. Stat. § 62-119 (1978):

The North Carolina Utilities Commission shall exercise over and in relation to radio common carriers the powers conferred by this Article.

(1) The word "Commission" when used in this Article means the North Carolina Utilities Commission.

(2) The word "commissioners" when used in this Article means the commissioners of the North Carolina Utilities Commission.

(3) The term "radio common carriers" when used in this Article includes every corporation, company, association, partnership and person and lessees, trustees, or receivers, appointed by any court whatsoever owning, operating or managing a business of providing or offering a service for hire to the public of one-way or two-way radio or radiotelephone communications whether interconnected with the land line telephone system or not and licensed by the Federal Communications Commission, but not engaged in the business of providing a public land line message telephone service or a public message telegraph service. The terms "telephone or telegraph utilities," "telephone or telegraph company," or a "person operating telegraph or telephone lines" when used in this Chapter, shall not be construed as including radio common carriers.

N.C. Gen. Stat. § 62-120 (1978):

No radio common carrier shall begin, or continue, the construction or operation of any radio system, or any extension thereof, or acquire ownership or control thereof either directly

or indirectly without first obtaining from the Public Utilities Commission a certificate that the present or future public convenience and necessity requires or will require such construction, operation or acquisition; provided this Article shall not require, nor shall it be so construed as to require, any such carrier to secure a certificate for an extension within any authorized service area within which such person has heretofore lawfully commenced operations, or for any extension within or to territory already served by such carrier, necessary in the ordinary course of business, or for substitute facilities within or to any authorized service area or territory already served by such carrier, or for any extension into territory contiguous to that already served by such carrier and not receiving similar service from another such carrier when no certificate of convenience and necessity has been issued to or applied for by any other radio common carrier or for the acquisition and operation of any plant or system heretofore constructed or hereafter constructed under authority of a certificate of convenience and necessity hereafter issued. The commissioners are hereby authorized to prescribe appropriate and reasonable rules and regulations governing the issuance of such certificates.

N.C. Gen. Stat. § 62-121 (1978):

Any person not presently franchised or certificated by the North Carolina Utilities Commission as a radio common carrier but engaged in the operation of any radio common carrier licensed by the Federal Communications Commission on June 11, 1969, shall receive a certificate of convenience and necessity from the North Carolina Utilities Commission authorizing such person to continue the operation of such radio common carrier in the territory professed to be served by such person on June 11, 1969, if, within 30 days after June 11, 1969, such person shall file with the Commission an application for such certificate, including copies of any license or licenses issued by the Federal Communications Commission to such person, showing the area professed to be served by such person.

N.C. Gen. Stat. § 62-122 (1978):

The Commission shall have the power and authority to set and regulate rates charged to the public by radio common carriers.

N.C. Gen. Stat. § 62-123 (1978):

The Commission shall not grant a certificate for a proposed radio common carrier operation or extension thereof into the established service area which will be in competition with or duplication of any other radio common carrier unless it shall first determine that the existing service is inadequate to meet the reasonable needs of the public and that the person operating the same is unable to or refuses or neglects after hearing on reasonable notice to provide reasonably adequate service.

N.C. Gen. Stat. § 62-124 (1978):

The provisions of this Article relate only to "radio common carriers" as defined herein and are distinguishable from mobile radio telephone service offered by land line telephone or telegraph utilities regulated by the Commission.

N.C. Gen. Stat. § 62-130 (1978):

(a) The Commission shall make, fix, establish or allow just and reasonable rates for all public utilities subject to its jurisdiction. A rate is made, fixed, established or allowed when it becomes effective pursuant to the provisions of this Chapter.

(b) The Commission may make or approve in its discretion special passenger or excursion rates.

(c) The Commission may make, require or approve, after public hearing, for intrastate shipments what are known as milling-in-transit, processing-in-transit, or warehousing-in-transit rates on grain, lumber to be dressed, cotton, peanuts, tobacco, or such other commodities as the Commission may designate.

(d) The Commission shall from time to time as often as circumstances may require, change and revise or cause to be changed or revised any rates fixed by the Commission, or allowed to be charged by any public utility.

N.C. Gen. Stat. § 62-131 (1978):

(a) Every rate made, demanded or received by any public utility, or by any two or more public utilities jointly, shall be just and reasonable.

(b) Every public utility shall furnish adequate, efficient and reasonable service.

N.C. Gen. Stat. § 62-132 (1978):

The rates established under this Chapter by the Commissioned shall be deemed just and reasonable, and any rate charged by any public utility different from those so established shall be deemed unjust and unreasonable. Provided, however, that upon petition filed by any interested person, and a hearing thereon, if the Commission shall find the rates or charges collected to be other than the rates established by the Commission, and to be unjust, unreasonable, discriminatory or preferential, the Commission may enter an order awarding such petitioner and all other persons in the same class a sum equal to the difference between such unjust, unreasonable, discriminatory or preferential rates or charges and the rates or charges found by the Commission to be just and reasonable, nondiscriminatory and nonpreferential, to the extent that such rates or charges were collected within two years prior to the filing of such petition.

N.C. Gen. Stat. § 62-133 (1978 & Supp. 1980):

(a) In fixing the rates for any public utility subject to the provisions of this Chapter, other than motor carriers and certain water and sewer utilities, the Commission shall fix such rates as shall be fair both to the public utility and to the consumer.

(b) In fixing such rates, the Commission shall:

(1) Ascertain the reasonable original cost of the public utility's property used and useful, or to be used and useful within a reasonable time after the test period, in providing the service rendered to the public within this State, less that portion of the cost which has been consumed by previous use recovered by depreciation expense plus the reasonable original cost of investment in plant under construction (construction work in progress). In ascertaining the cost of the public utility's property, construction work in progress as of the effective date of this subsection shall be excluded until such plant comes into service but reasonable and prudent expenditures for construction work in progress after the effective date of this subsection shall be included subject to the provisions of subparagraph (b) (5) of this section.

(2) Estimate such public utility's revenue under the present and proposed rates.

(3) Ascertain such public utility's reasonable operating expenses, including actual investment currently consumed through reasonable actual depreciation.

(4) Fix such rate of return on the cost of the property ascertained pursuant to subdivision (1) as will enable the public utility by sound management to produce a fair return for its shareholders, considering changing economic conditions and other factors, as they then exist, to maintain its facilities and services in accordance with the reasonable requirements of its customers in the territory covered by its franchise, and to compete in the market for capital funds on terms which are reasonable and which are fair to its customers and to its existing investors.

(4a) Require each public utility to discontinue capitalization of the composite carrying cost of capital funds used to finance construction (allowance for funds) on the construction work in progress included in its rate base upon the effective date of the first and each subsequent general rate order issued with respect to it after the effective date of this subsection; allowance for funds may be capitalized with respect to expenditures for construction work in

progress not included in the utility's property upon which the rates were fixed. In determining net operating income for return, the Commission shall not include any capitalized allowance for funds used during construction on the construction work in progress included in the utility's rate base.

(5) Fix such rates to be charged by the public utility as will earn in addition to reasonable operating expenses ascertained pursuant to subdivision (3) of this subsection the rate of return fixed pursuant to subdivisions (4) and (4a) on the cost of the public utility's property ascertained pursuant to subdivision (1).

(c) The original cost of the public utility's property, including its construction work in progress, shall be determined as of the end of the test period used in the hearing and the probable future revenues and expenses shall be based on the plant and equipment in operation at that time. The test period shall consist of 12 months' historical operating experience prior to the date the rates are proposed to become effective, but the Commission shall consider such relevant, material and competent evidence as may be offered by any party to the proceeding tending to show actual changes in costs, revenues or the cost of the public utility's property used and useful, or to be used and useful within a reasonable time after the test period, in providing the service rendered to the public within this State, including its construction work in progress, which is based upon circumstances and events occurring up to the time the hearing is closed.

(d) The Commission shall consider all other material facts of record that will enable it to determine what are reasonable and just rates.

(e) The fixing of a rate of return shall not bar the fixing of a different rate of return in a subsequent proceeding.

(f) Unless otherwise ordered by the Commission subsections (b), (c), and (d) shall not apply to rate changes of utilities engaged in the distribution of natural gas bought at wholesale by the utility for distribution to consumers to the extent such rate changes are occasioned by changes in the wholesale rate

of such natural gas. The Commission may permit such rate changes to become effective simultaneously with the effective date of the change in the wholesale cost of such natural gas, or at such other time as the Commission may direct. This subsection shall not prohibit the Commission from investigating and changing unreasonable rates in accordance with the provisions of this Chapter. The public utility shall give such notice, which may include notice by publication, of the changes to interested parties as the Commission in its discretion may direct.

N.C. Gen. Stat. § 62–134 (1978):

Unless the Commission otherwise orders, no public utility shall make any changes in any rate which has been duly established under this Chapter, except after 30 days' notice to the Commission, which notice shall plainly state the changes proposed to be made in the rates then in force, and the time when the changed rates will go into effect. The public utility shall also give such notice, which may include notice by publication, of the proposed changes to other interested persons as the Commission in its discretion may direct. All proposed changes shall be shown by filing new schedules, or shall be plainly indicated upon schedules filed and in force at the time and kept open to public inspection. The Commission, for good cause shown in writing, may allow changes in rates without requiring the 30 days' notice, under such conditions as it may prescribe. All such changes shall be immediately indicated upon its schedules by such public utility.

(b) Whenever there is filed with the Commission by any public utility any schedule stating a new or revised rate or rates, the Commission may, either upon complaint or upon its own initiative, upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate or rates. Pending such hearing and the decision thereon, the Commission, upon filing with such schedule and delivering to the public utility affected thereby a statement in writing of its reasons therefor, may, at any time before they become effective, suspend the operation of such rate or rates, but not for a longer period than

270 days beyond the time when such rate or rates would otherwise go into effect. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate shall go into effect at the end of such period. After hearing, whether completed before or after the rate goes into effect, the Commission may make such order with respect thereto as would be proper in a proceeding instituted after it had become effective.

(c) At any hearing involving a rate changed or sought to be changed by the public utility, the burden of proof shall be upon the public utility to show that the changed rate is just and reasonable.

(d) Notwithstanding the provisions of this Article, any public utility engaged solely in distributing electricity to retail customers, which electricity has been purchased at wholesale rates from another public utility, an electric membership corporation or a municipality, may in its discretion, and without the necessity of public hearings as in this section is otherwise provided, elect to adopt the same retail rates to customers charged by the public utility, electric membership corporation or municipality from whom the wholesale power is purchased for the same service, unless the North Carolina Utility Commission finds upon a hearing, either on its own initiative or upon complaint, that the rate of return earned by such utility upon the basis of such rates is unjust and unreasonable. In such a proceeding the burden of proof shall be upon the electrical distribution company.

(e) Notwithstanding the provisions of this Article, upon application by any public utility for permission and authority to increase its rates and charges based solely upon the increased cost of fuel used in the generation or production of electric power, the Commission shall suspend such proposed increase for a period not to exceed 90 days beyond the date of filing of such application to increase rates. Upon motion of the Commission or application of any person having an interest in said rate, the Commission shall set for hearing any request for decrease in rates or charges based solely upon a decrease in the cost of fuel. The Commission shall promptly investigate

applications filed pursuant to provisions of this subsection and shall hold a public hearing within 30 days of the date of the filing of the application to consider such application, and shall base its order upon the record adduced at the hearing, such record to include all pertinent information available to the Commission at the time of hearing. The order responsive to an application shall be issued promptly by the Commission but in no event later than 90 days from the date of filing of such application. A proceeding under this subsection shall not be considered a general rate case. All monthly fuel adjustment rate increases based solely upon the increased cost of fuel, as to each public utility, as presently approved by the Commission shall fully terminate effective September 1, 1975, except that the same shall be earlier terminated as to each such public utility upon the effective date of any final order of the Commission, under this section; provided, however, that the termination date of September 1, 1975, shall not apply to any public utility which has filed an application under this subsection on or before July 1, 1975, and where the Commission has not issued a final order by September 1, 1975. In any proceeding pursuant to this subsection, any person directly interested in the proceeding shall have a full right of intervention.

(f) The Commission may adopt rules prescribing the information and exhibits required to be filed with any applications, or tariff for an increase in utility rates, including but not limited to all of the evidence or proof through the end of the test period which the utility will rely on at any hearing on such increase, and the Commission may suspend such increase until such data, information or exhibits are filed, in addition to the time provided for suspension of such increase in other provisions of this Chapter.

N.C. Gen. Stat. § 62–138 (1978):

(a) Under such rules as the Commission may prescribe, every public utility:

(1) Shall file with the Commission all schedules of rates,

service regulations and forms of service contracts, used or to be used within the jurisdiction of the Commission; and

(2) Shall keep copies of such schedules, service regulations and contracts open to public inspection.

(b) Every regular route common carrier of general commodities and every common carrier of passengers shall file with the Commission, print, and keep open for public inspection schedules showing all rates for the transportation of property or passengers in intrastate commerce and all services in connection therewith between points on its own routes and between points on its own routes and points on the routes of other such common carriers, and if it establishes joint rates with other common carriers, it shall include in its schedules so filed such joint rates.

(c) Every irregular route common carrier shall file with the Commission, print, and keep open for public inspection schedules showing all rates for the transportation of property in intrastate commerce between points within the area of its authorized operation, and if it establishes joint rates with other common carriers, it shall include in its schedules so filed such joint rates between points within the area of its own authorized operation and points on the line or route of such other common carriers.

(d) The schedules required by this section shall be published, filed, and posted in such form and manner and shall contain such information as the Commission may prescribe; and the Commission is authorized to reject any schedule filed with it which is not in compliance with this section. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) No public utility, unless otherwise provided by this Chapter, shall engage in service to the public unless its rates for such service have been filed and published in accordance with the provisions of this section.

(f) Under such rules as the Commission may prescribe, every electric membership corporation operating within this State shall file with the Commission, for information purposes,

all rates, schedules of rates, charges, service regulations, and forms of service contracts, used or to be used within the State, and shall keep copies of such schedules, rates, charges, service regulations, and contracts open to public inspection.

(g) No public utility may offer or maintain telephone service to any subscriber to such service who has in use or proposes to place in use equipment which will enable said subscriber to observe or monitor telephone calls directed to or placed by said subscriber unless said subscriber shall agree that such equipment shall be used in conformity with the standards for the use of such equipment adopted by the Commission.

N.C. Gen. Stat. § 62–139 (1978):

(a) No public utility shall directly or indirectly, by any device whatsoever, charge, demand, collect or receive from any person a greater or less compensation for any service rendered or to be rendered by such public utility than that prescribed in the schedules of such public utility applicable thereto then filed in the manner provided in this Article, nor shall any person receive or accept any service from a public utility for a compensation greater or less than that prescribed in such schedules.

(b) Any public utility in the State which shall willfully charge a rate for any public utility service in excess of that prescribed in the schedules of such public utility applicable thereto then filed under this Article, and which shall omit to refund the same within 30 days after written notice and demand of the person overcharged, unless relieved by the Commission for good cause shown, shall be liable to him for double the amount of such overcharge, plus a penalty of ten dollars ($10.00) per day for each day's delay after 30 days from such notice or date of denial or relief by the Commission, whichever is later. Such overcharge and penalty shall be recoverable in any court of competent jurisdiction.

N.C. Gen. Stat. § 62-161 (1978):

(a) No public utility shall issue any securities, or assume any liability or obligation as lessor, lessee, guarantor, indor-

ser, surety, or otherwise, in respect to the securities of any other person unless and until, and then only to the extent that, upon application by such utility, and after investigation by the Commission of the purposes and uses of the proposed issue, and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, the Commission by order authorizes such issue or assumption.

(b) The Commission shall make such order only if it finds that such issue or assumption is (i) for some lawful object within the corporate purposes of the public utility, (ii) is compatible with the public interest, (iii) is necessary or appropriate for or consistent with the proper performance by such utility of its service to the public and will not impair its ability to perform that service, and (iv) is reasonably necessary and appropriate for such purpose.

(c) Any such order of the Commission shall specify the purposes for which any such securities or the proceeds thereof may be used by the public utility making such application.

(d) If a public utility shall apply to the Commission for the refinancing of its outstanding shares of stock by exchanging or redeeming such outstanding shares, the exchange or redemption of such shares of any dividend rate or rates, class or classes, may be made in whole or in part, in the manner and to the extent approved by the Commission, notwithstanding any provisions of law applicable to corporations in general: Provided, that the proposed transactions are found by the Commission to be in the public interest and in the interest of consumers and investors, and provided that any redemption shall be at a price or prices not less than par, and at a time or times, stated or provided for in the utility charter or stock certificates.

N.C. Gen. Stat. § 62-162 (1978):

The Commission, by its order, may grant or deny the application provided for in the preceding section [G.S. 62-161] as made, or may grant it in part or deny it in part or

may grant it with such modification and upon such terms and conditions as the Commission may deem necessary or appropriate in the premises and may, from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate, and may, by any such supplemental order, modify the provisions of any previous order as to the particular purposes, uses, and extent to which or the condition under which any securities so authorized or the proceeds thereof may be applied subject always to the requirements of the foregoing section [G.S. 62-161].

N.C. Gen. Stat. § 62-163 (1978):

Every application for authority for such issue or assumption shall be made in such form and contain such matters as the Commission may prescribe. Every such application and every certificate of notification hereinafter provided for shall be made under oath, signed and filed on behalf of the public utility by its president, a vice president, auditor, comptroller, or other executive officer duly designated for that purpose by such utility.

N.C. Gen. State. § 62-164 (1978):

All applications for the issuance of securities or assumption of liability or obligation shall be placed at the head of the Commission's docket and disposed of promptly, and all such applications shall be disposed of in 30 days after the same are filed with the Commission, unless it is necessary for good cause to continue the same for a longer period for consideration. Whenever such application is continued beyond 30 days after the time it is filed, the order making such continuance must state fully the facts necessitating such continuance.

N.C. Gen. Stat. § 62-166 (1978):

Nothing herein shall be construed to imply any guarantee or obligation as to such securities on the part of the State of North Carolina.

N.C. Gen. Stat. § 62-167 (1978):

The provisions of the foregoing sections shall not apply to notes issued by a utility for proper purposes and not in violation of law, payable at a period of not more than two years from the date thereof, and shall not apply to like notes issued by a utility payable at a period of not more than two years from the date thereof, to pay, retire, discharge, or refund in whole or in part any such note or notes, and shall not apply to renewals thereof from time to time not exceeding in the aggregate six years from the date of the issue of the original note or notes so renewed or refunded. No such notes payable at a period of not more than two years from the date thereof, shall, in whole or in part, directly or indirectly, be paid, retired, discharged or refunded by any issue of securities or another kind of any term or character or from the proceeds thereof without the approval of the Commission. Within 10 days after the making of any such notes, so payable at periods of not more than two years from the date thereof, the utility issuing the same shall file with the Commission a certificate of notification, in such form as may be determined and prescribed by the Commission.

N.C. Gen. Stat. § 62-168 (1978):

Nothing contained in this Article shall limit the power of any court having jurisdiction to authorize or cause receiver's certificates or debentures to be issued according to the rules and practice obtained in receivership proceedings in courts of equity.

N.C. Gen. Stat. § 62-169 (1978):

The Commission shall require periodical or special reports from each public utility issuing any security, including such notes payable at periods of not more than two years from the date thereof, which shall show, in such detail as the Commission may require, the disposition made of such securities and the application of the proceeds.

N.C. Gen. Stat. § 62-170 (1978):

(a) Securities issued and obligations and liabilities assumed by a public utility, for which the authorization of the Commission is required, shall not be invalidated because issued or assumed without such authorization therefor having first been obtained or because issued or assumed contrary to any term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption.

(b) Securities issued or obligations or liabilities assumed in accordance with all the terms and conditions of the order of authorization therefor shall not be affected by a failure to comply with any provision of this Article or rule or regulation of the Commission relating to procedure and other matters preceding the entry of such order of authorization or order supplemental thereto.

(c) A copy of any order made and entered by the Commission and certified by a clerk of the Commission approving the issuance of any securities or the assumption of any obligation or liability by a public utility shall be sufficient evidence of full and complete compliance by the applicant for such approval with all procedural and other matters required precedent to the entry of such order.

(d) Any public utility which willfully issues any such securities, or assumes any such obligation or liability, or makes any sale or other disposition of securities, or applies any securities or the proceeds thereof to purposes other than the purposes specified in an order of the Commission with respect thereto, contrary to the provisions of this Article, shall be liable to a penalty of not more than ten thousand dollars ($10,000), but such utility is only required to specify in general terms the purpose for which any securities are to be issued, or for which any obligation or liability is to be assumed, and the order of the Commission with respect thereto shall likewise be in general terms.

N.C. Gen. Stat. § 62-171 (1978):

If a commission or other agency or agencies empowered by another state to regulate and control the amount and

character of securities to be issued by any public utility within such other state, then the Utilities Commission of the State of North Carolina shall have the power to agree with such commission or other agency or agencies of such other state on the issue of stocks, bonds, notes or other evidences of indebtedness by a public utility owning or operating a public utility both in such state and in this State and shall have the power to approve such issue jointly with such commission or other agency or agencies and to issue joint certificate of such approval: Provided, however, that no such joint approval shall be required in order to express the consent to an approval of such issue by the State of North Carolina if said issue is separately approved by the Utilities Commission of the State of North Carolina.

N.C. Gen. Stat. § 62–290 (1978):

When the property and franchises of a public utility corporation are sold under a judgment or decree of a court of this State, or of the district court of the United States, or under execution, to satisfy a mortgage debt or other encumbrance thereon, such sale vests in the purchaser all the right, title, interest and property of the parties to the action in which such judgment or decree was made, to said property and franchises, subject to all the conditions, limitations and restrictions of the corporation; and the purchaser and his associates thereupon become a new corporation, by such name as they select, and they are the stockholders in the ratio of the purchase money by them contributed; and are entitled to all the rights and franchises and subject to all the conditions, limitations and penalties of the corporation whose property and franchises have been so sold. In the event of the sale of a railroad in foreclosure of a mortgage or deed of trust, whether under a decree of court or otherwise, the corporation created by or in consequence of the sale succeeds to all the franchises, rights and privileges of the original corporation only when the sale is of all the railroad owned by the company and described in the mortgage or deed of trust, and when the railroad is sold as an entirety. If a purchaser at any such sale is a corporation, such purchasing corporation shall succeed

to all the properties, franchises, powers, rights, and privileges of the original corporation: Provided, that this shall not affect vested rights and shall not be construed to alter in any manner the public policy of the State now or hereafter established with reference to trusts and contracts in restraint of trade.

N.C. Gen. Stat. § 62–291 (1978):

(a) The persons for whom the property and franchises have been purchased pursuant to G.S. 62-290 shall meet within 30 days after the delivery of the conveyance made by virtue of said judgment or decree, and organize the new corporation, 10 days' written notice of the time and place of the meeting having been given to each of said persons. At this meeting they shall adopt a corporate name and seal, determine the amount of the capital stock of the corporation, and shall have power and authority to make and issue certificates of stock in shares of such amounts as they see fit. The corporation may then, or at any time thereafter, create and issue preferred stock to such an amount, and at such time, as they may deem necessary.

(b) Whenever the purchaser of the real estate, track and fixtures of any railroad corporation which has heretofore been sold, or may hereafter be sold, by virtue of any mortgage executed by such corporation or execution issued upon any judgment or decree of any court, shall acquire title to the same in the manner prescribed by law, such purchaser may associate with him any number of persons, and make and acknowledge and file articles of association as prescribed by this Chapter. Such purchaser and his associates shall thereupon be a new corporation, with all the powers, privileges and franchises and subject to all of the provisions of this Chapter.

(c) When any railroad corporation shall be dissolved, or its property sold and conveyed under any execution, deed of trust, mortgage or other conveyance, the owner or purchaser shall constitute a new corporation upon compliance with law.

N.C. Gen. Stat. § 62–292 (1978):

It is the duty of the new corporation provided for by this Article, within one month after its organization, to make certificate thereof, under its common seal, attested by the signature of its president, specifying the date of the organization, the name adopted, the amount of capital stock, and the names of its president and directors, and transmit the certificate to the Secretary of State, to be filed and recorded in his office. A certified copy of this certificate so filed shall be recorded in the office of the clerk of the superior court of the county in which is located the principal office of the corporation, and is the charter and evidence of the corporate existence of the new corporation.

N.C. Gen. Stat. § 62–293 (1978):

Nothing contained in this Article in any manner impairs the lien of a prior mortgage, or other encumbrance, upon the property or franchises conveyed under a sale pursuant to this Article when by the terms of the judgment or decree under which the sale was made, or by operation of law, the sale was made subject to the lien of any such prior mortgage or other encumbrance. No such sale and conveyance or organization of such new corporation in any way affects the rights of any person or body politic not a party to the action in which the judgment or decree was made, nor of any party except as determined by the judgment or decree. When a trustee has been made a party to such action and his cestui que trust, for reason satisfactory to the court, has not been made a party thereto, the rights and interest of the cestui que trust are concluded by the decree.

N.C. Gen. Stat. § 62–310 (1978):

(a) Any public utility which violates any of the provisions of this Chapter or refuses to conform to or obey any rule, order or regulation of the Commission shall, in addition to the other penalties prescribed in this Chapter forfeit and pay a sum up to one thousand dollars ($1,000) for each offense,

to be recovered in an action to be instituted in the Superior Court of Wake County, in the name of the State of North Carolina on the relation of the Utilities Commission; and each day such public utility continues to violate any provision of this Chapter or continues to refuse to obey or perform any rule, order or regulation prescribed by the Commission shall be a separate offense.

(b) If any person or corporation shall furnish water or sewer utility service in violation of any provision of this Chapter applicable to water or sewer utilities, except as to the reasonableness of rates or charges and the discriminatory character thereof, or shall provide such service in violation of any rule, regulation or order of the Commission, the Commission shall apply to the resident superior court judge of any judicial district where such person or corporation so operates, or to any superior court judge holding court in such judicial district, for the enforcement of any provision of this Chapter or of any rule, regulation or order of the Commission. The court shall have jurisdiction to enforce obedience to this Chapter or to any rule, regulation or order of the Commission by appropriate writ, order or other process restraining such person, corporation, or their representatives from further violation of this Chapter or of any rule, regulation or order of the Commission.

SOUTH DAKOTA
PUBLIC UTILITIES COMMISSION LAWS

S.D. Comp. Laws Ann. § 49-1-8 (1980):

The public utilities commissioners so elected shall constitute a commission to be known and designated as the public utilities commission of the state of South Dakota, and they shall have power to elect a secretary and prescribe his duties. Such commission shall have an official seal, which shall be judicially noticed.

S.D. Comp. Laws Ann. § 49-3-1 (1980):

The term "transportation" shall include all instrumentalities of shipment or carriage, and also the transmission of messages by telegraph or telephone, and the term "common carrier" as used in chapters 49-3 to 49-12, inclusive, shall be deemed and taken to mean all corporations, companies, or individuals now owning or operating, or which may hereafter own or operate any railroad, express company, telegraph, or telephone company, in whole or in part, in this state.

S.D. Comp. Laws Ann. § 49-3-3 (1980):

The provisions of chapters 49-3 to 49-12, inclusive, shall apply to the transportation of messages by telegraph or telephone and shall apply to all telegraph or telephone companies; to any common carrier engaged in this state in the transportation of messages by telegraph or telephone; to all lines and facilities of any and every kind, character, or description in use by any corporation, receiver, trustee, or other person operating a telegraph or telephone company, whether owned or operated under contract, agreement, lease, or otherwise.

S.D. Comp. Laws Ann. § 49-3-4 (1980):

The public utilities commission shall have general supervision of all common carriers in the state.

S.D. Comp. Laws Ann. § 49-3-10 (1980):

The public utilities commission shall have authority to require any common carrier doing business in this state to install any facility necessary for the safety, convenience, and accommodation of the public, including telegraph lines and instruments and operators therefor, and telephone lines and instruments.

S.D. Comp. Laws Ann. § 49-3-11 (1980):

It shall be the duty of the public utilities commission, and each member thereof shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this chapter, and such commission shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable it to perform the duties and carry out the objects for which it was created, and which are contemplated by chapters 49-3 to 49-12, inclusive.

S.D. Comp. Laws Ann. § 49-8-2 (1980):

All common carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the receiving, forwarding, and delivering of messages by telegraph or telephone to and from their several lines and to and from other lines and places connected therewith, and shall not discriminate in their accommodations, rates, and charges between such connecting lines.

S.D. Comp. Laws Ann. § 49-10-1 (1980):

The public utilities commission is authorized and directed to make for each of the common carriers doing business in this state a schedule of reasonable maximum fares and rates of charges for the transportation or transmission of passengers, freight, express, and messages by telegraph or tele-

phone, on or over each of such common carriers, and authority to make schedules shall include the power of classification of all such freight, express, and messages by telegraph or telephone, and it shall be the duty of such commission to make such classification. Such commission shall have authority to fix different rates or schedules of rates for different common carriers and for different lines and different parts of the same line of any common carrier.

Such commission shall from time to time and as often as circumstances may require, change and revise such schedules.

S.D. Comp. Laws Ann. § 49-30-1 (1980):

Any number of persons not less than five may form a corporation for the purpose of constructing, maintaining, and operating lines of telegraph or telephone in this state, and for the purpose of carrying on the business of a telegraph or telephone company, or for the purpose of maintaining and operating any lines of telegraph or telephone already constructed, by making articles of incorporation in which shall be stated:

(1) The name of the corporation, which shall not be the same as that of any other corporation owning or operating lines of telegraph or telephone in this state;

(2) The place from which and to which such lines of telegraph or telephone are to be constructed, or maintained and operated, as the case may be;

(3) The estimated length of such lines of telegraph or telephone, and the name of each county in this state through or into which they are extended or intended to be constructed;

(4) The amount of capital stock of the corporation, the number of shares of which it shall consist, and, if such stock shall consist of common and preferred stock, the number and amount of each class;

(5) The names and residences of the directors of the corporation who shall manage its affairs for the first year and until others are chosen in their places, and who shall not be less than five nor more than thirteen in number;

(6) The term for which the corporation shall exist, which shall not exceed thirty years;

(7) The place within this state where the principal office of the corporation shall be maintained, and where the corporate records and stock books of the corporation shall be kept.

Each of the incorporators shall subscribe to the articles of incorporation his name, place of residence, and the number of shares of stock he agrees to take in such corporation.

S.D. Comp. Laws Ann. § 49-31-1 (1980):

The terms "telegraph company" and "telephone company," as used in this chapter, mean all corporations, associations, and individuals, their trustees, lessees, and receivers, that now or hereafter may own, operate, manage, or control any telegraph or telephone line, system, or exchange, or any part of any telegraph or telephone line, system, or exchange, in this state. "Independent telephone company" means a telephone company organized and operating under the laws of the state of South Dakota and providing service to less than seven thousand subscribers within the state.

S.D. Comp. Laws Ann. § 49-31-2 (1980):

All telegraph and telephone companies as defined by § 49-31-1 are hereby declared to be common carriers, and all laws, so far as applicable, now in force or hereafter enacted regulating common carriers, shall apply with equal force and effect to all such telegraph and telephone companies.

S.D. Comp. Laws Ann. § 49-31-3 (1980):

The public utilities commission shall have general supervision and control of all telegraph and telephone lines and exchanges constructed and operated in this state, and it shall be the duty of such commission to inquire into any complaints or unjust discrimination, neglect, or violation of the laws of the state governing such companies, by their owner or owners, or by any of their officers, agents, or employees.

S.D. Comp. Laws Ann. § 49-31-6 (1980):

The public utilities commission shall have authority to make a physical valuation of all the property of any telegraph or telephone company, or of any telegraph or telephone line or exchange, to be taken only when such valuation is necessary for the purpose of arriving at any determination in connection with the regulation of its business or the adjustment of its rates.

S.D. Comp. Laws Ann. § 49-31-7 (1980):

In addition to the regulatory powers and duties provided by chapters 49-1 to 49-12, inclusive, the public utilities commission shall make such investigations and order such changes and betterments and improvements in telegraph or telephone lines and exchanges as may be deemed necessary for the improvement of the telegraph and telephone service and the convenience of the public.

S.D. Comp. Laws Ann. § 49-31-15 (1980):

The public utilities commission shall have jurisdiction to compel the connection of different telegraph or telephone lines in this state. Any telegraph or telephone company desiring its lines to connect with any other company's line or exchange shall, whenever such connection shall be refused, make application to the public utilities commission. Upon receipt of such application the public utilities commission shall ascertain the facts in the case and if in its judgment the public service demands such connection and the lines of the applicant are in proper condition, such commission shall order such connection to be made and shall apportion the expense thereof.

Tenn. Code Ann. § 65-4-101 (1980):

The term "public utility" is defined to include every individual, copartnership, association, corporation, or joint stock company, their lessees, trustees, or receivers, appointed by any court whatsoever, that own, operate, manage or control, within the state any interurban electric railway, traction company, all other common carriers, express, gas, electric light, heat, power, water, telephone, telegraph, or any other like system, plant or equipment, affected by and dedicated to the public use, under privileges, franchises, licenses, or agreements, granted by the state or by any political subdivision thereof; provided, however, that the term "public utility" as herein defined shall not be construed to include the following (hereinafter called nonutilities):

(1) Any corporation owned by or any agency or instrumentality of the United States;

(2) Any county, municipal corporation or other subdivision of the state of Tennessee;

(3) Any corporation owned by or any agency or instrumentality of the state;

(4) Any corporation or joint stock company more than fifty per cent (50%) of the voting stock or shares of which is owned by the United States, the state of Tennessee or by any nonutility referred to in (1), (2), and (3) hereof;

(5) Any cooperative organization, association or corporation not organized or doing business for profit;

(6) Any of the foregoing nonutilities acting jointly or in combination or through a joint agency or instrumentality.

Provided, however, that the term "public utility" as herein defined shall not be construed to include nonprofit homeowners associations or organizations whose membership is limited to owners of lots in residential subdivisions, which associations or organizations own, construct, operate or maintain water,

street light or park maintenance service systems for the exclusive use of that subdivision, provided that the subdivisions are unable to obtain such services from the local utility district. None of the property, property rights or facilities owned or used by the association or organiztaion for the rendering of such services shall be under the jurisdiction, supervision or control of the public service commission.

Tenn. Code Ann. § 65-4-104 (1980):

The Tennessee public service commission shall have general supervision and regulation of, jurisdiction, and control over, all public utilities, and also over their property, property rights, facilities, and franchises, so far as may be necessary for the purpose of carrying out the provisions of this chapter. Provided, however, that such general supervision and regulation of and jurisdiction and control shall not apply to street railway companies.

Tenn. Code Ann. § 65-4-105 (1980):

(a) In addition to the power conferred by this chapter on the commission it shall possess with reference to all public utilities within its jurisdiction all the other powers conferred on the commission with reference to railroads or transportation companies as provided by chapters 3 and 5 of this title;

(b) Where any existing contract between any public utility and any municipality specifies that particular things (other than charging certain rates, tolls or fares) shall continue to be done by such public utility, or the nature, kind, and quality of any particular service to be rendered by the public utility to the municipality or its people, nothing in this section nor in this title shall be construed to authorize the commission to excuse such public utility from continuing to do such specified things or from continuing to render and perform the service of at least the nature, kind and quality specified in any such existing contract; but, all these things involving the cost of the service shall be taken into consideration by the commission in exercising its power to pass upon the reasonableness of

any rate, fare, or charge hereafter to be made by such public utility.

(c) No provision of this section or of this title shall be construed to alter or impair any existing contract between any public utility and any municipality whereby it has been agreed that any payments of money, in addition to proper ad valorem taxes, shall be made by any such public utility to or for the benefit of any such municipality or its people, but all such things, involving the cost of the service, shall be taken into consideration by the commission in exercising its power to pass upon the reasonableness of any rate, fare or charge hereafter to be made by such public utility;

(d) When any public utility regulated by the commission supplies its services to consumers who use solar or wind powered equipment as a source of energy, such public utility shall not discriminate against such consumers by its rates, fees or charges or by altering the availability or quality of energy. Any consumer who uses solar, wind power, or other auxiliary source of energy shall install and operate the equipment, property, or appliance for such energy source in compliance with any state or local code or regulation applicable to the safe operation of such equipment, property, or appliance;

(e) Any franchise payment or other payment for the use of public streets, alleys or other public places or any license, privilege, occupation or excise tax payment, which after February 24, 1961 may be made by a utility to a municpality or other political subdivision, except such taxes as are presently provided for under existing statutes and except such franchise payment or other payments as are presently exacted from the utility pursuant to the terms of any existing franchise or other agreement, shall, insofar as practicable, be billed pro rata to the utility customers receiving local service within the municipality or political subdivision receiving such payments, and shall not otherwise be considered by the commission in fixing the rates and charges of the utility;

(f) The commission shall futher have jurisdiction over all utility districts created pursuant to Tennessee law, to the

extent that the exercise of such jurisdiction is provided by chapter 82 of title 7 and chapter 51 of the Public Acts of 1951, as herein or hereafter amended.

Tenn. Code Ann. § 65-4-106 (1980):

This chapter shall not be construed as being in derogation of the common law, but shall be given a liberal construction, and any doubt as to the existence or extent of a power conferred by this chapter or chapters 1, 3 and 5 of this title, on the commission shall be resolved in favor of the existence of the power, to the end that the commission may effectively govern and control the public utilities placed under its jurisdiction by this chapter.

Tenn. Code Ann. § 65-4-107 (1980):

No privilege or franchise hereafter granted to any public utility by the state of Tennessee or by any political subdivision thereof shall be valid until approved by said commission, such approval to be given when, after hearing, said commission determines that such privilege or franchise is necessary and proper for the public convenience and properly conserves the public interest, and the commission shall have power, if it so approves, to impose such conditions as to construction, equipment, maintenance, service or operation as the public convenience and interest may reasonably require; provided, however, that nothing contained in this chapter shall be construed as applying to the laying of sidings, sidetracks, or switchouts, by any public utility, and it shall not be necessary for any such public utility to obtain a certificate of convenience from the commission for such purpose.

Tenn. Code Ann. § 65-4-110 (1980):

The commission shall have power, after hearing, upon notice, by order in writing, to require every public utility as defined in § 65-4-101 to carry for the protection of stockholders, bondholders or holders of securities a proper and adequate depreciation account in accordance with such rules, regula-

tions, and forms of account, as the commission may prescribe. The commission shall have power to ascertain and determine, and by order in writing, after hearing, fix proper and adequate rates of depreciation of the property of each public utility, and each public utility shall conform its depreciation accounts to the rates so ascertained, determined, and fixed, and shall set aside the moneys so provided for out of earnings and carry the same in a depreciation fund. The income from investments or moneys in such fund shall likewise be carried in such fund. This depreciation fund shall not be expended otherwise than for depreciation, improvements, new constructions, extensions, or additions to the property of such public utility, unless the commission shall by order in writing give permission to the public utility to divert the fund to purposes other than those herein named.

Tenn. Code Ann. § 65-4-111 (1980):

The commission shall have power, after hearing, upon notice, by order in writing to require every public utility as defined in § 65-4-101 to keep its books, records, and accounts so as to afford an intelligent understanding of the conduct of its business, and to that end to require every such public utility of the same class to adopt a uniform system of accounting. Such system shall conform, where applicable to any system adopted or approved by the interstate commerce commission of the United States. And to furnish annually, or at such other times as the commission may require, a detailed report of finances and operations as shown by said system of accounts.

Tenn. Code Ann. § 65-4-112 (1980):

(a) No lease of its property, rights, or franchises, by any such public utility, and no merger or consolidation of its property, rights and franchises by any such public utility with the property, rights and franchises of any other such public utility of like character shall be valid until approved by the commission, even though power to take such action

has been conferred on such public utility by the state of Tennessee or by any political subdivison thereof.

(b) Any public utility as defined in § 65-4-101, may, without the approval or consent of the state of Tennessee, or the Tennessee public service commission, or any other agency of the state, sell, lease, or otherwise dispose of any of its property, including, but without limitation, franchises, rights, facilities, and other assets, and its capital stock, to any of the nonutilities defined in § 65-4-101.

Tenn. Code Ann. § 65-4-113 (1980):

The commission shall have power, after hearing, upon notice, by order in writing, to require every public utility as defined in § 65-4-101:

(1) To furnish safe, adequate, and proper service and to keep and maintain its property and equipment in such condition as to enable it to do so; and

(2) To establish, construct, maintain, and operate any reasonable extension of its existing facilities where in the judgment of said commission such extension is reasonable and practicable, and will furnish sufficient business to justify the construction, operation, and maintenance of the same, and when the financial condition of the public utility affected reasonably warrants the original expenditure required in making such extension, or to abandon any service when in the judgment of the commission the public welfare no longer requires the same.

Tenn. Code Ann. § 65-4-114 (1980):

No public utility shall adopt, maintain, or enforce any regulation, practice, or measurement which shall be unjust, unreasonable, unduly preferential or discriminatory, nor shall any public utility provide or maintain any service that is unsafe, improper, or inadequate, or withhold or refuse any service which can reasonably be demanded and furnished when ordered by said commission.

Tenn. Code Ann. § 65-4-115 (1980):

(a) The penalties prescribed by Chapter 3 of this title shall be and remain in full force and effect, and shall in every case apply to any public utility within this chapter in the same manner and to the same extent as they are made applicable to and imposed on railroad and transportation companies under said chapter 3.

(b) Any person, firm or corporation who violates any provision of this chapter pertaining to the safety of pipeline facilities and the transportation of gas, or of any regulation or rule thereunder, shall be subject to a civil penalty not to exceed one thousand dollars ($1,000) for each violation for each day that the violation persists. However, the maximum civil penalty shall not exceed two hundred thousand dollars ($200,000) for any related series of violations.

(c) Any civil penalty pertaining to gas pipeline safety statutes and regulations may be compromised by the Tennessee public service commission. In determining the amount of the penalty, or the amount agreed upon in compromise, the appropriateness of the penalty to the size of the business of the person, firm or corporation charged, the gravity of the violation and the good faith of the person, firm or corporation charged in attempting to achieve compliance, after notification of a violation, shall be considered. The amount of the penalty, when finally determined, or the amount agreed upon in compromise, may be deducted from any sums owing by the state to the person, firm or corporation charged or may be recovered in a civil action in the courts of this state.

Tenn. Code Ann. § 65-4-201 (1980):

No public utility shall establish or begin the construction of, or operate any line, plant, or system, or route in or into a municipality or other territory already receiving a like service from another public utility, or establish service therein, without first having obtained from the Tennessee public service commission, after written application and hearing, a certificate that the present or future public convenience and

necessity require or will require such construction, establishment, and operation, and no person or corporation not at the time a public utility shall commence the construction of any plant, line, system, or route to be operated as a public utility, or the operation of which would constitute the same, or the owner or operator thereof, a public utility as defined by law, without having first obtained, in like manner, a similar certificate; provided, that this section shall not be construed to require any public utility to obtain a certificate for an extension in or about a municipality or territory where it shall theretofore have lawfully commenced operations, or for an extension into territory, whether within or without a municipality, contiguous to its route, plant, line, or system, and not theretofore receiving service of a like character from another public utility, or for substitute or additional facilities in or to territory already served by it.

Tenn. Code Ann. § 65-4-202 (1980):

If any public utility, in establishing, constructing, reconstructing, or extending its route, line, plant or system, shall interfere or be about to interfere with the existing route, line, plant, or system of any other public utility, the said commission, on complaint of the public utility claiming to be injuriously affected, may, after hearing, make such order and prescribe such terms and conditions in harmony with this part as are just and reasonable. Such commission shall have power, after hearing involving the financial ability and good faith of the applicant, the necessity for additional service in the municipality or territory, and such other matters as it deems relevant, to issue a certificate of public necessity and convenience, or to refuse to issue the same or to issue it for the establishment or construction of a portion only of the contemplated plant, route, line, or system or extension thereof, or for the partial exercise only of such right or privilege, and may attach to the exercise of the rights granted by said certificate such terms and conditions as to time or otherwise as in its judgment the public convenience, necessity, and protection may require, and may forfeit such certificate after issuance, for noncompliance with its terms, or provide

therein for an ipso facto forfeiture of the same for failure to exercise the rights granted within the time fixed by the commission; provided, that nothing in this part shall be construed as requiring such certificate for a municipally owned plant, project, or development.

Tenn. Code Ann. § 65-4-203 (1980):

(a) The said commission shall not grant a certificate for a proposed route, plant, line, or system, or extension thereof, which will be in competition with any other route, plant, line, or system, unless it shall first determine that the facilities of the existing route, plant, line, or system are inadequate to meet the reasonable needs of the public, or the public utility operating the same refuses or neglects or is unable to or has refused or neglected, after reasonable opportunity after notice, to make such additions and extensions as may reasonably be required under the provisions of this part.

(b) In all proceedings under this section, the commission shall give at least ten (10) days' notice to the authorities of, and the public utilities operating in, the municipality or territory affected.

VIRGINIA STATE CORPORATION COMMISSION LAWS

Virginia Constitution, Article IX, § 2 (in pertinent part):

Subject to the provisions of this Constitution and to such requirements as may be prescribed by law, the Commission shall be the department of government through which shall be issued all charters, and amendments or extensions thereof, of domestic corporations and all licenses of foreign corporations to do business in this Commonwealth.

Except as may be otherwise prescribed by this Constitution or by law, the Commission shall be charged with the duty of administering the laws made in pursuance of this Constitution for the regulation and control of corporations doing business in this Commonwealth. Subject to such criteria and other requirements as may be prescribed by law, the Commission shall have the power and be charged with the duty of regulating the rates, charges, and services and, except as may be otherwise authorized by this Constitution or by general law, the facilities of railroad, telephone, gas, and electric companies. . . .

Va. Code § 56-35 (1981):

The Commission shall have the power, and be charged with the duty, of supervising, regulating and controlling all public service companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses therein by such companies.

Va. Code § 56-56 (1981):

The power of public service companies to issue stocks and stock certificates or other evidences of interest or ownership, and bonds, notes and other evidences of indebtedness and to create liens on their property situated within this State is a special privilege, the right of supervision, regulation, restric-

tion, and control of which is and shall continue to be vested in the State; and such power shall be exercised as provided by law and under such rules and regulations as the Commission may prescribe; provided that this section shall not apply to obligations incurred for purchase of machinery or equipment where such obligations are secured by conditional sales contracts.

Va. Code § 56-57 (1981):

This chapter shall apply to every stock or stock certificate or other evidence of interest or ownership, and, except as otherwise provided by § 56-65, every bond, note or other evidence of indebtedness, of a public service company, which may be issued, and to every obligation or liability as guarantor, indorser, surety or otherwise in respect of the securities of any other person, firm, association or corporation, when such securities are payable at periods of twelve months or more after the date thereof, which may be or may have been assumed after March twenty-fourth, nineteen hundred and thirty-four, notwithstanding the fact that any preparatory steps, whether by the issuance or amendment of a certificate of incorporation, or by the action of the board of directors, or the stockholders or otherwise, may have been taken prior to such date.

Va. Code § 56-58 (1981):

A public service company may issue stocks and stock certificates or other evidences of interest or ownership, and bonds, notes and other evidences of indebtedness payable at periods of twelve months or more after the date thereof, for the following purposes and no others, namely:

(1) For the acquisition of property (including stocks, stock certificates or other evidences of interest or ownership, and bonds, notes and other evidences of indebtedness of other persons, firms, associations or corporations when the acquisition thereof has been approved and authorized by the Commission);

(2) For the construction, completion, extension or improvement of its facilities;

(3) For the improvement or maintenance of its service;

(4) For the discharge or lawful refunding of its obligations; or

(5) For the reimbursement of moneys actually expended from income, or from any other moneys in the treasury of the public service company not secured by or obtained from the issue of its stocks or stock certificates or other evidences of interest or ownership of bonds, notes or other evidences of indebtedness payable at periods of twelve months or more after the date thereof, for any of the aforesaid purposes except maintenance of service in cases where the applicant shall have kept its accounts and vouchers for such expenditures in such manner as to enable the Commission to ascertain the amount of moneys so expended and the purposes for which such expenditures were made.

Va. Code § 56-67 (1981):

Any stock, or stock certificate or other evidence of interest or ownership, and, except as otherwise provided by § 56-65, any bond, note or other evidence of indebtedness, of a public service company, and every assumption of obligation or liability as a guarantor, indorser, surety or otherwise in respect to the securities of any other person, firm, association or corporation, when such securities are payable at periods of twelve months, or more, after the date thereof, shall be void if issued or assumed without an order of the Commission authorizing the same, or if issued or assumed contrary in any substantial respect to any term or condition of such order as issued, or as modified prior to such issuance or assumption; but no such issuance or assumption, if made in accordance in every substantial respect with all terms and conditions of such order as issued or as modified prior to such issuance or assumption, shall be rendered void because of failure to comply with any provision of this chapter relating to procedure or other matters preceding the entry of such order.

Va. Code § 56-77 (1981):

No contract or arrangement providing for the furnishing of management, supervisory, construction, engineering, accounting, legal, financial, or similar services, and no contract or arrangement for the purchase, sale, lease or exchange of any property, right or thing, other than those above enumerated, or for the purchase or sale of treasury bonds or treasury capital stock made or entered into between a public service company and any affiliated interest shall be valid or effective unless and until it shall have been filed with and approved by the Commission. It shall be the duty of every public service company to file with the Commission a verified copy of any such contract or arrangement, regardless of the amount involved, and the general rule herein referred to shall remain in full force and effect as to all other public service companies.

Va. Code § 56-80 (1981):

The Commission shall have continuing supervisory control over the terms and conditions of such contracts and arrangements as are herein described so far as necessary to protect and promote the public interest. The Commission shall have the same jurisdiction over the modification or amendment of contracts or arrangements herein described as it has over such original contracts or arrangements. The fact that the Commission shall have approved entry into any such contract or arrangement shall not preclude disallowance or disapproval of payments made pursuant thereto in the future, if upon actual experience under such contract or arrangement, it appears that the payments provided for, or made, were, or are, unreasonable. Every order of the Commission approving any such contract or arrangements shall be expressly conditioned upon the reserved power of the Commission to revise and amend the terms and conditions thereof, if, when and as necessary to protect and promote the public interest.

Va. Code § 56-265.2 (1981):

It shall be unlawful for any public utility to construct, enlarge, or acquire, by lease or otherwise, any facilities for

use in public utility service, except ordinary extensions or improvements in the usual course of business within the territory in which it is lawfully authorized to operate, without first having obtained a certificate from the Commission that the public convenience and necessity require the exercise of such right or privilege. Such certificate shall be issued by the Commission only after formal or informal hearing and after due notice to interested parties.

Va. Code § 56-265.3 (1981):

No public utility shall engage in furnishing public utility service within the State without first having obtained from the Commission a certificate of public convenience and necessity authorizing it to furnish such service. . . .

Va. Code § 56-265.4 (1981):

No certificate shall be granted to an applicant proposing to operate in the territory of any holder of a certificate unless and until it shall be proved to the satisfaction of the Commission that the service rendered by such certificate holder in such territory is inadequate to the requirements of the public necessity and convenience; and if the Commission shall be of opinion that the service rendered by such certificate holder in such territory is in any respect inadequate to the requirements of the public necessity and convenience, such certificate holder shall be given reasonable time and opportunity to remedy such inadequacy before any certificate shall be granted to an applicant proposing to operate in such territory.

WEST VIRGINIA
PUBLIC SERVICE COMMISSION LAWS

W. Va. Code § 24-1-1 (1980):

(a) It is the purpose and policy of the legislature in enacting this chapter to confer upon the public service commission of this State the authority and duty to enforce and regulate the practices, services and rates of public utilities in order to:

(1) Ensure fair and prompt regulation of public utilities in the interest of the using and consuming public;

(2) Provide the availability of adequate, economical and reliable utility services throughout the State;

(3) Encourage the well-planned development of utility resources in a manner consistent with state needs and in ways consistent with the productive use of the State's energy resources, such as coal;

(4) Ensure that rates and charges for utility services are just, reasonable, applied without unjust discrimination or preference and based primarily on the costs of providing these services; and

(5) Encourage energy conservation and the effective and efficient management of regulated utility enterprises.

(b) The legislature creates the public service commission to exercise the legislative powers delegated to it. The public service commission is charged with the responsibility for appraising and balancing the interests of current and future utility service customers, the general interests of the State's economy and the interests of the utilities subject to its jurisdiction in its deliberations and decisions.

(c) The legislature encourages the public service commission to explore and consider the potential benefits or risks associated with the adoption in this State of emerging concepts in utility rate making, service standards and rate design. The commission is directed to conduct inquiries and hearings into such concepts as cost of service, declining block rates, time-of-day rates, peak load pricing, seasonal rates, lifeline rates, interruptible rates, load management techniques, master

metering, automatic adjustment clauses, information to consumers concerning rate schedules, procedures for termination of service and advertising.

The public service commission shall report to the governor and the legislature regarding its policies and approach to each of these areas not later than the first day of January, one thousand nine hundred eighty-two.

(d) It is legislative policy to ensure that the legislature and the general public become better informed regarding the regulation of public utilities in this State and the conduct of the business of the public service commission. To aid in the achievement of this policy, the public service commission annually shall present to the joint committee on government and finance, created by article three [§ 4-3-1 et seq.], chapter four of this Code, or a subcommittee designated by the joint committee, a management summary report which describes in a concise manner:

(1) The major activities of the commission for the year especially as such activities relate to the implementation of the provisions of this chapter;

(2) Important policy decisions reached and initiatives undertaken during the year;

(3) The current balance of supply and demand for natural gas and electric utility services in the State and a forecast of the probable balance for the next ten years; and

(4) Other information considered by the commission to be important including recommendations for statutory reform and the reasons for such recommendations.

(e) In addition to any other studies and reports required to be conducted and made by the public service commission pursuant to any other provision of this section, the commission shall study and initially report to the legislature no later than the first day of the regular session of the legislature in the year one thousand nine hundred eighty, upon:

(1) The extent to which natural gas wells or wells heretofore supplying gas utilities in this State have been capped off or shut in; the number of such wells, their probable extent of future production and the reasons given

and any justification for, capping off or shutting in such wells, the reasons if any, why persons engaged or heretofore engaged in the development of gas wells in this State or the Appalachian areas have been discouraged from drilling, developing or selling the production of such wells and whether there are fixed policies by any utility or group of utilities to avoid the purchase of natural gas produced in the Appalachian region of the United States generally and in West Virginia specifically.

(2) The extent of the export and import of natural gas utility supplies in West Virginia.

(3) The cumulative effect of the practices mentioned in subdivisions (1) and (2) of this subsection upon rates theretofore and hereafter charged gas utility customers in West Virginia.

In carrying out the provisions of this section the commission shall have jurisdiction over such persons, whether public utilities or not, as may be in the opinion of the commission necessary to the exercise of its mandate and may compel attlendance before it, take testimony under oath and compel the production of papers or other documents. Upon reasonable request by the commission, all other state agencies shall cooperate with the commission in carrying out the provisions and requirements of this subsection.

(f) No later than the first day of the regular session of the legislature in the year one thousand nine hundred eighty, the public service commission shall submit to the legislature a plan for internal reorganization which plan shall specifically address the following:

(1) A division within the public service commission which shall include the office of the commissioners, the hearing examiners and such support staff as may be necessary to carry out the functions of decision making and general supervision of the commission, which functions shall not include advocacy in cases before the commission;

(2) The creation of a division which shall act as an advocate for the position of and in the interest of all customers;

(3) The means and procedures by which the division to be created pursuant to the provisions of subdivision (2) of this subsection shall protect the interests of each class of customers and the means by which the commission will assure that such division will be financially and departmentally independent of the division created by subdivision (1) of this subsection;

(4) The creation of a division within the public service commission which shall assume the duties and responsibilities now charged to the commissioners with regard to motor carriers which division shall exist separately from those divisions set out in subdivisions (1) and (2) of this subsection and which shall relieve the commissioners of all except minimal administrative responsibilities as to motor carriers and which plan shall provide for a hearing procedure to relieve the commissioners from hearing motor carrier cases;

(5) Which members of the staff of the public service commission shall be exempted from the salary schedules or pay plan adopted by the civil service commission and identify such staff members by job classification or designation, together with the salary or salary ranges for each such job classification or designation;

(6) The manner in which the commission will strengthen its knowledge and independent capacity to analyze key conditions and trends in the industries it regulates extending from general industry analysis and supply-demand forecasting to continuing and more thorough scrutiny of the capacity planning, construction management, operating performance and financial condition of the major companies within these industries.

Such plan shall be based on the concept that each of the divisions mentioned in subdivisions (1), (2) and (4) of this subsection shall exist independently of the others and the plan shall discourage ex parte communications between them by such means as the commission shall direct, including, but not limited to, separate clerical and professional staffing for each division. Further, the public service commission is directed to incorporate within the said plan to the fullest

extent possible the recommendations presented to the subcommittee on the public service commission of the joint committee on government and finance in a final report dated February, one thousand nine hundred seventy-nine and entitled "A Plan For Regulatory Reform and Management Improvement."

The commission shall before the fifth day of January, one thousand nine hundred eighty, adopt said plan by order which order shall promulgate the same as a rule of the commission to be effective upon the date specified in said order, which date shall be no later than the thirty-first day of December, one thousand nine hundred eighty. Certified copies of such order and rule shall be filed on the first day of the regular session of the legislature, one thousand nine hundred eighty, by the chairman of the commission with the clerk of each house of the legislature, the governor and the secretary of state. The chairman of the commission shall also file with the office of the secretary of state the receipt of the clerk of each house and of the governor, which receipt shall evidence compliance with this section.

Upon the filing of a certified copy of such order and rule, the clerk of each house of the legislature shall report the same to their respective houses and the presiding officer thereof shall refer the same to appropriate standing committee or committees.

Within the limits of funds appropriated therefor, the rule of the public service commission shall be effective upon the date specified in the order of the commission promulgating it unless an alternative plan be adopted by general law or unless the rule is disapproved by a concurrent resolution of the legislature adopted prior to adjournment sine die of the regular session of the legislature to be held in the year one thousand nine hundred eighty: Provided, that if such rule is approved in part and disapproved in part by a concurrent resolution of the legislature adopted prior to such adjournment, such rule shall be effective to the extent and only to the extent that the same is approved by such concurrent resolution.

The rules promulgated and made effective pursuant to this section shall be effective notwithstanding any other provisions of this Code for the promulgation of rules or regulations.

(g) The public service commission is hereby directed to cooperate with the joint committee on government and finance of the legislature in its review, examination and study of the administrative operations and enforcement record of the railroad safety division of the public service commission and any similar studies.

W. Va. Code § 24-1-2 (1980):

Except where a different meaning clearly appears from the context the words "public utility" when used in this chapter shall mean and include any person or persons, or association of persons, however associated, whether incorporated or not, including municipalities, engaged in any business, whether herein enumerated or not, which is, or shall hereafter be held to be, a public service. Whenever in this chapter the words "commission" or "public service commission" occur such word or words shall, unless a different intent clearly appears from the context, be taken to mean the public service commission of West Virginia. Whenever used in this chapter, "customer" shall mean and include any person, firm, corporation, municipality, public service district or any other entity who purchases a product or services of any utility and shall include any such person, firm, corporation, municipality, public service district or any other entity who purchases such services or product for resale.

W. Va. Code § 24-2-1 (1980):

The jurisdiction of the commission shall extend to all public utilities in this State, and shall include any utility engaged in any of the following public services:

Common carriage of passengers or goods, whether by air, railroad, street railroad, motor or otherwise, by express or otherwise, by land, water or air, whether wholly or partly by land, water or air; transportation of oil, gas or water by

pipeline; transportation of coal and its derivatives and all mixtures and combinations thereof with other substances by pipeline; sleeping car or parlor car services; transmission of messages by telephone, telegraph or radio; generation and transmission of electrical energy by hydroelectric or other utilities for service to the public, whether directly or through a distributing utility; supplying water, gas or electricity, by municipalities or others; sewer systems servicing twenty-five or more persons or firms other than the owner of the sewer systems; any public service district created under the provisions of article thirteen-A [§ 16-13A-1 et seq.], chapter sixteen of this Code; toll bridges; wharves, ferries; and any other public service: Provided, that the jurisdiction the commission may exercise over the rates and charges of municipally operated public utilities is limited to that authority granted the commission in section four-b [§ 24-2-4b] of this article: Provided, however, that the decision-making authority granted to the commission in sections four and four-a [§§ 24-2-4 and 24-2-4a] of this chapter shall, in respect to an application filed by a public service district, be delegated to a single hearing examiner appointed from the commission staff, which hearing examiner shall be authorized to carry out all decision-making duties assigned to the commission by said sections, and to issue orders having the full force and effect of orders of the commission.

The commission may, upon application, waive its jurisdiction and allow a utility operating in an adjoining state to provide service in West Virginia when:

(1) An area of West Virginia cannot be practicably and economically served by a utility licensed to operate within the State of West Virginia;

(2) Said area can be provided with utility service by a utility which operates in a state adjoining West Virginia;

(3) The utility operating in the adjoining state is regulated by a regulatory agency or commission of the adjoining state; and

(4) The number of customers to be served is not substantial.

The rates the out-of-state utility charges West Virginia customers shall be the same as the rate the utility is duly authorized to charge in the adjoining jurisdiction.

The commission, in the case of any such utility , may revoke its waiver of jurisdiction for good cause.

W. Va. Code § 24-2-1a (1980):

The commission or its duly authorized representatives are hereby authorized and empowered to enter and inspect any property, premise or place, owned or operated by a railroad, whether fixed facilities or rolling stock, including, but not limited to, locomotives, cars and cabooses, stationary or in motion, at any reasonable time for the purpose of ascertaining the state of compliance with this article and rules and regulations in force pursuant thereto. No person shall refuse entry or access to the commission or any authorized representative of the commission who requests entry for purposes of inspection, and who presents appropriate credentials; nor shall any person obstruct, hamper or interfere with any such inspection.

W. Va. Code § 24-2-2 (1980):

The commission is hereby given power to investigate all rates, methods and practices of public utilities subject to the provisions of this chapter; to require them to conform to the laws of this State and to all rules, regulations and orders of the commission not contrary to law; and to require copies of all reports, rates, classifications, schedules and timetables in effect and used by such utility or other person, to be filed with the commission, and all other information desired by the commission relating to such investigation and requirements, including inventories of all property in such form and detail as the commission may prescribe. The commission may compel obedience to its lawful orders by mandamus or injunction or other proper proceedings in the name of the State in any circuit court having jurisdiction of the parties or of the subject matter, or the supreme court of appeals direct,

and such proceedings shall have priority over all pending cases. The commission may change any intrastate rate, charge or toll which is unjust or unreasonable or any interstate charge with respect to matters of a purely local nature which have not been regulated by or pursuant to act of Congress and may prescribe such rate, charge or toll as would be just and reasonable, and change or prohibit any practice, device or method of service in order to prevent undue discrimination or favoritism between persons and between localities and between commodities for a like and contemporaneous service. But in no case shall the rate, toll or charge be more than the service is reasonably worth, considering the cost thereof. Every order entered by the commission shall continue in force until the expiration of the time, if any, named by the commission in such order, or until revoked or modified by the commission, unless the same be suspended, modified or revoked by order or decree of a court of competent jurisdiction.

W. Va. Code § 24-2-3 (1980):

The commission shall have power to enforce, originate, establish, change and promulgate tariffs, rates, joint rates, tolls and schedules for all public utilities: Provided, that the commission may exercise such rate authority over municipal utilities only under the circumstances set forth in section four-b [§ 24-2-4b] of this article. And whenever the commission shall, after hearing, find any existing rates, tolls, tariffs, joint rates or schedules unjust, unreasonable, insufficient or unjustly discriminatory or otherwise in violation of any of the provisions of this chapter, the commission shall by an order fix reasonable rates, joint rates, tariffs, tolls or schedules to be followed in the future in lieu of those found to be unjust, unreasonable, insufficient or unjustly discriminatory or otherwise in violation of any provisions of law, and the said commission, in fixing the rate of any railroad company, may fix a fair, reasonable and just rate to be charged on any branch line thereof, independent of the rate charged on the main line of such railroad.

W. Va. Code § 24-2-6 (1980):

Whenever, after hearing, upon notice, the public service commission shall determine that public convenience or necessity requires that conduits, subways, poles or other equipment on, over or under any street or highway belonging to or used by any public utility should be used in part by another public utility for the operation of its property in any locality not reached by the lines or connections of one of such utilities, or a municipality, the public service commission may, by order, fix the just and reasonable terms and conditions of such use, and prescribe the compensation to be paid therefor. And, whenever, after hearing, upon notice, the public service commission shall determine that public convenience and necessity require a physical connection for the establishment of a continuous line of communication between any two or more public utilities regularly engaged in the conveyance of telephone or telegraph messages, for the conveyance of such messages between different localities, which are not reached by the lines or connection of one of such utilities, the public service commission, may, by order, ascertain, determine and fix the just and reasonable terms and conditions of such physical connection, including just and reasonable rules and regulations and the just and reasonable charge that shall be made to the public for the use of such continuous line between such localities and the division of the charge between such two or more public utilities, and the apportionment of the cost of making such physical connection between such public utilities, and it shall be the duty of such public utility thereafter to conform to such order of the public service commission. But no order shall be made by the public service commission under this section to apply where such use or physical connection will prevent those owning, operating, managing or controlling any part of such conduits, subways, poles or other equipment, or such proposed continuous lines of communication, from performing their public duties, nor result in serious injury to those owning, operating, managing or controlling any part of such conduits, subways, poles or other equipment, or of the proposed continuous line of communication.

Such use so ordered shall be permitted and such physical connection or connections so ordered shall be made; and the terms, conditions and compensation so prescribed for such use and such physical connections shall be the lawful conditions and compensation for such use and physical connection, and the lawful terms and conditions upon which such use and physical connections shall be had and made. Any such order may be from time to time revised by the commission upon application of any interested party or upon its own motion.

W. Va. Code § 24-2-7 (1980):

(a) Whenever, under the provisions of this chapter, the commission shall find any regulations, measurements, practices, acts or services to be unjust, unreasonable, insufficient or unjustly discriminatory, or otherwise in violation of any provisions of this chapter, or shall find that any service is inadequate, or that any service which is demanded cannot be reasonably obtained, the commission shall determine and declare, and by order fix reasonable measurements, regulations, acts, practices or services, to be furnished, imposed, observed and followed in the State in lieu of those found to be unjust, unreasonable, insufficient, or unjustly discriminatory, inadequate or otherwise in violation of this chapter, and shall make such other order respecting the same as shall be just and reasonable.

(b) If the public service commission shall determine that any utility is unable or unwilling to adequately serve its customers or has been actually or effectively abandoned by its owners, or that its management is grossly and willfully inefficient, irresponsible or unresponsive to the needs of its customers, the commission may petition to the circuit court of any county wherein the utility does business for an order attaching the assets of the utility and placing such utility under the sole control and responsibility of a receiver. If the court determines that the petition is proper in all respects and finds, after a hearing thereon, that the allegations contained in the petition are true, it shall grant the same and shall order that the utility be placed in receivership. The

court, in its discretion and in consideration of the recommendation of the commission, shall appoint a receiver who shall be a responsible individual, partnership or corporation knowledgeable in public utility affairs and who shall maintain control and responsibility for the running and management of the affairs of such utility. In so doing, the receiver shall operate the utility so as to preserve the assets of the utility and to serve the best interests of its customers. The receiver shall be compensated from the assets of said utility in an amount to be determined by the court.

W. Va. Code § 24-2-11 (1980):

No public utility, person or corporation shall begin the construction of any plant, equipment, property or facility for furnishing to the public any of the services enumerated in section one [§ 24-2-1], article two of this chapter, nor apply for, nor obtain any franchise, license or permit from any municipality or other governmental agency, except ordinary extensions of existing systems in the usual course of business, unless and until it shall obtain from the public service commission a certificate of public convenience and necessity requiring such construction, franchise, license or permit. Upon the filing of any application for such certificate, and after hearing, the commission may, in its discretion, issue or refuse to issue or issue in part and refuse in part, such certificate of convenience and necessity: Provided, that the commission, after it gives proper notice and if no protest is received within thirty days after the notice is given, may waive formal hearing on the application. Notice shall be given by publication which shall state that a formal hearing may be waived in the absence of protest, made within thirty days, to the application. The notice shall be published as a Class I legal advertisement in compliance with the provisions of article three [§ 59-3-1 et seq.], chapter fifty-nine of this Code. The publication area shall be the proposed area of operation. Any public utility person, or corporation subject to the provisions of this section shall give the commission at least thirty days' notice of the filing of any such application for a certificate of public convenience and necessity under this

section: Provided, that the commission may modify or waive the thirty-day notice requirement. The commission shall render its final decision on any application filed after the thirtieth day of June, one thousand nine hundred eight-one, under the provisions of this section or section eleven-a [§ 24-2-11a] of this article within two hundred seventy days of the filing of the application and within ninety days after final submission of any such application for decision following a hearing: Provided, that if the projected total cost of the project is greater than fifty million dollars, the commission shall render its final decision of any such application filed under the provisions of this section or section eleven-a of this article within four hundred days of the filing of the application and within ninety days after final submission of any such application for decision after a hearing. If such decision is not rendered within the aforementioned two hundred seventy days, four hundred days or ninety days, the commission shall issue a certificate of convenience and necessity as applied for in the application. The commission shall prescribe such rules and regulations as it may deem proper for the enforcement of the provisions of this section; and, in establishing that public convenience and necessity do exist, the burden of proof shall be upon the applicant.

W. Va. Code § 24-2-12 (1980):

Unless the consent and approval of the public service commission of West Virginia is first obtained: (a) No public utility subject to the provisions of this chapter, except railroads other than street railroads, may enter into any contract with any other utility to operate any line or plant of any other utility subject thereto, nor which will enable such public utility to operate their lines or plants in connection with each other, but this shall not be construed to prevent physical connections between utilities supplying the same service or commodity, for temporary purposes only, upon condition, however, that prompt notice thereof be given to the commission for such action, if any, as it may deem necessary, and thereafter the commission may require such connection to be removed or discontinued; (b) no public utility

subject to the provisions of this chapter, except railroads other than street railroads, may purchase, lease, or in any other manner acquire control, direct or indirect, over the franchises, licenses, permits, plants, equipment, business or other property of any other utility; (c) no public utility subject to the provisions of this chapter, except railroads other than street railroads, may assign, transfer, lease, sell, or otherwise dispose of its franchises, licenses, permits, plants, equipment, business or other property or any part thereof; but this shall not be construed to prevent the sale, lease, assignment or transfer by any public utility of any tangible personal property which is not necessary or useful, nor will become necessary or useful in the future, in the performance of its duties to the public; (d) no public utility subject to the provisions of this chapter, except railroads other than street railroads, may, by any means, direct or indirect, merge or consolidate its franchises, licenses, permits, plants, equipment, business or other property with that of any other public utility; (e) no public utility subject to the provisions of this chapter, except railroads other than street railroads, may purchase, acquire, take or receive any stock, stock certificates, bonds, notes, or other evidence of indebtedness of any other public utility; (f) no public utility subject to the provisions of this chapter, except railroads other than street railroads, may, by any means, direct or indirect, enter into any contract or arrangement for management, construction, engineering, supply, or financial services or for the furnishing of any other service, property or thing, with any affiliated corporation, person or interest.

The commission may grant its consent in advance or exempt from the requirements of this section all assignments, transfers, leases, sales or other disposition of the whole or any part of the franchises, licenses, permits, plants, equipment, business or other property of any public utility, or any merger or consolidation thereof and every contract, purchase of stocks, arrangement or other transaction referred to in this section, upon proper showing that the terms and conditions thereof are reasonable and that neither party thereto is given an undue advantage over the other, and do not adversely affect the public in this State.

The commission shall prescribe such rules and regulations as, in its opinion, are necessary for the reasonable enforcement and administration of this section, including the procedure to be followed, the notice to be given of any hearing hereunder, if it deems a hearing necessary, and after such hearing or in case no hearing is required, the commission shall, if the public will be convenienced thereby, enter such order as it may deem proper and as the circumstances may require, attaching thereto such conditions as it may deem proper, consent to the entering into or doing of the things herein provided, without approving the terms and conditions thereof, and thereupon it shall be lawful to do the things provided for in such order.

Every assignment, transfer, lease, sale or other disposition of the whole or any part of the franchises, licenses, permits, plant, equipment, business or other property of any public utility, or any merger or consolidation thereof and every contract, purchase of stock, arrangement or other transaction referred to in this section made otherwise than as hereinbefore provided shall be void to the extent that the interests of the public in this State are adversely affected, but this shall not be construed to relieve any utility from any duty required by this section. (1935, c. 115.)

W. Va. Code § 24-3-1 (1980):

Every public utility subject to this chapter shall establish and maintain adequate and suitable facilities, safety appliances or other suitable devices, and shall perform such service in respect thereto as shall be reasonable, safe and sufficient for the security and convenience of the public, and the safety and comfort of its employees, and in all respects just and fair, and without any unjust discrimination or preference. All charges, tolls and rates shall be just and reasonable, and no change shall be made in any tarriffs, rates, joint rates, tolls, schedules or classifications except as herein provided. Every railroad shall permit switch connections for intrastate business to be made with its tracks at suitable and safe points by other carriers or shippers, upon such terms and conditions as the

commission may prescribe, whenever, in the judgment of the commission, the business to be offered by the connecting company or shipper justifies it. Every railroad and other transportation company may be required by the commission to establish and maintain such suitable public service facilities and conveniences as may be reasonable and just, to make reasonable connections with trains on branch lines of such railroads and with all connecting railroad lines; to require any passenger trains to stop at junctions or intersections with other railroads; and may prescribe the number of men required to constitute safe crews for the handling of trains on any railroad in this State or any division of any such railroad. No railroad or other public utility shall discontinue any regular passenger train, or other public service facility, or change any regular passenger train schedule or timetable, without first obtaining authority from the commission so to do, unless the same be done under uniform rules and regulations filed by such railroad or public utility with the public service commission and approved by said commission.

W. Va. Code § 24-3-7 (1980):

No railroad or other public utility shall abandon all or any portion of its service to the public or the operation of any of its lines which would affect the service it is rendering the public unless and until there shall first have been filed with the public service commission of this State an application for a permit to abandon service and obtained from the commission an order stating that the present and future public convenience and necessity permits such abandonment.

Wis. Stat. Ann. § 184.06 (1957)

(1) Upon the conclusion of its investigation, if the commission shall find that the proposed issue complies with the provisions of this chapter and that the financial condition, plan of operation and proposed undertakings of the corporation are such as to afford reasonable protection to purchasers of the securities to be issued, it shall issue to the corporation a certificate of authority stating: (1) The amount of securities reasonably necesary and the character of the same; (2) the purposes for which they are to be issued in such detail as the commission may deem necessary; and (3) the terms on which they are to be sold or otherwise disposed of, including a description and a determination of the value of any property or services to be received in partial or full payment therefor; and the corporation shall not issue the securities on any other terms or for any other purposes than that stated in such certificate. If any portion of the securities authorized by the certificate are evidences of indebtedness which are to be pledged to secure lawful obligations of the applicant, the commission in its certificate shall state the minimum price at which such securities may be sold in the event of any enforcement of the pledge. If the purpose of the issue is, in whole or in part, to provide funds for properties to be constructed or acquired, the commission may, if it finds that the public interest so requires, require the applicant to impound the proceeds of such securities, or furnish suitable bonds to guarantee the completion of such project, under such conditions as the commission shall find to be reasonable and shall specify in the certificate.

(2) The commission may attach to the issuance of any certificate under this chapter such terms, conditions or requirements as in its judgment are reasonably necessary to protect the public interest. Any public service corporation dissatisfied with any of the terms or conditions so imposed by the commission in such certificate of authority shall be limited in its remedy to an action to modify or set aside the

commission order authorizing a certificate of authority, as provided by section 184.08. Any public service corporation issuing securities pursuant to any certificate of authority, not having brought any such action to set aside such order shall be deemed thereby to have waived any and all objections to the terms, conditions and requirements contained in such certificate of authority.

Wis. Stat. Ann. § 196.01 (1957 & Supp. 1982):

(1) As used in this chapter and ch. 197, unless the context requires otherwise, "public utility" means corporation, company, individual, association, their lessees, trustees or receivers appointed by any court, and every sanitary district, town, village or city that may own, operate, manage or control any toll bridge or any plant or equipment or any part of a plant or equipment, within the state, for the conveyance of telephone messages, for the receiving, transmitting, or delivery of messages of telegraph, or for the production, transmission, delivery or furnishing of heat, light, water or power either directly or indirectly to or for the public. No cooperative association organized under chapter 185 for the purpose of producing or furnishing heat, light, power or water to its members only shall be deemed a public utility under this definition. "Public utility" includes any person, firm, or corporation engaged in the transmission or delivery of natural gas for compensation within this state by means of pipes or mains.

(2) "Municipal council" means and embraces the common council or the sanitary commission or the town or village board of any town, village or city wherein the property of the public utility or any part thereof is located.

(3) "Municipality" means any town, village or city wherein property of a public utility or any part thereof is located.

(4) "Service" is used in its broadest and most inclusive sense.

(5) "Indeterminate permit" means and embraces every grant, directly or indirectly, from the state to any public

utility, of power, right or privilege to own, operate, manage or control any plant or equipment or any part of a plant or equipment within this state for the production, transmission, delivery or furnishing of any public utility service, and such permit shall continue in force until the municipality shall exercise its option to purchase, or until it shall be otherwise terminated according to law.

(6) "Railroad" has the meaning attributed to it by section 195.02.

(7) The words "conveyance of telephone messages" or "conveyance of telegraph messages" shall, if the person engaged in such activity is otherwise a telephone or telegraph public utility as defined in sub. (1), also include in addition to voice communication the transmission of information, data or material other than by voice communication.

(8) "Commission" means the public service commission.

Wis. Stat. Ann. § 196.02 (1957 & Supp. 1982):

(1) The Commission is vested with power and jurisdiction to supervise and regulate every public utility in this state, and to do all things necessary and convenient in the exercise of such power and jurisdiction.

(2) In this subsection, "public utility" does not include a telephone cooperative except as provided under § 196.205. The commission shall provide for a comprehensive classification of service for each public utility, and such classification may take into account the quantity used, the time when used, the purpose for which used, and any other reasonable consideration. Each public utility shall conform its schedules of rates, tolls and charges to such classification.

(3) The commission may adopt reasonable rules to govern its proceedings and to regulate the mode and manner of all inspections, tests, audits, investigations, and hearings.

(4) (a) The commission shall have authority to inquire into the management of the business of all public utilities, and shall keep itself informed as to the manner and method in

which the same is conducted, and may obtain from any public utility all necessary information to enable the commission to perform its duties.

(b) Each public utility shall furnish to the commission in such form and at such times as the commission shall require, the following information respecting the identity of the holders of its voting capital stock, in order to enable the commission to determine whether such holders constitute an affiliated interest within the meaning of this chapter: The names of each holder of one per centum or more of the voting capital stock of such public utility; the nature of the property right or other legal or equitable interest which the holder has in such stock; and any other similarly relevant information which the commission shall prescribe and direct.

(c) In the event any public utility shall fail to furnish the commission with information required of it by the commission, the commission may issue an order directing the delinquent public utility to furnish such information forthwith, or to show good cause why such information cannot be obtained. Failure of any public utility to comply with such order of the commission shall be deemed a violation of this chapter, within the meaning of section 196.66.

(5) The commission or any commissioner or any person employed by the commission for that purpose shall, upon demand, have the right to inspect the books, accounts, papers, records and memoranda of any public utility, and to examine, under oath, any officer, agent or employee of such public utility in relation to its business and affairs. Any person other than one of said commissioners, who shall make such demand, shall produce his authority to make such inspection.

(6) The commissioner may require, by order or subpoena, served on any public utility as a summons is served in circuit court, the production within this state at such time and place as it may designate, of any books, accounts, papers or records kept by said public utility without the state, or verified copies in lieu thereof, if the commission shall so order. Any public utility failing or refusing to comply with any such order or

subpoena shall, for each day it shall so fail or refuse, forfeit not less than fifty dollars nor more than five hundred dollars.

(7) The commission may upon its own motion initiate and investigate and order a hearing upon such notice as it deems proper, unless a statute prescribes in a particular case a specific manner of giving notice, in every case in which it is authorized to investigate and hear upon complaint or petition or in which it is authorized to investigate or act without complaint or petition and may exercise therein the same jurisdiction as upon complaints filed. The authority herein conferred extends to all matters within the jurisdiction of the commission in whatever chapter of the statutes set forth.

(8) The commission may employ counsel in any proceeding, investigation, hearing or trial had by it or in which it shall be party, and the expenses thereby incurred shall be charged to the commission's appropriation.

(9) A substantial compliance with the requirements of the statutes shall be sufficient to give effect to all rules, orders, acts and regulations of the commission and they shall not be declared inoperative, illegal or void for any omission of a technical nature in respect thereto.

(10) Notices of investigation or hearing or certifications to copies of the records of the commission may be issued or certified by any member of the commission or by its secretary or its assistant secretary.

(11) The chairman of the commission may appoint, outside the classified service, an executive assistant to serve at his pleasure and perform such duties as he prescribes.

(12) The public service commission may sue and be sued in that name, and may confer with or participate in any proceedings before any regulatory agency of any other state or of the federal government.

Wis. Stat. Ann. § 196.04 (1957):

(1) Every public utility and every person having conduits, subways, poles, towers, transmission wires or other equip-

ment on, over or under any street or highway, shall for a reasonable compensation, permit the use of the same by any public utility, whenever public convenience and necessity require such use, and such use will not result in irreparable injury to the owner or other users of such equipment, nor in any substantial detriment to the service to be rendered by such owners or other users; and every utility for the conveyance of telephone messages shall permit physical connections to be made, and telephone service to be furnished, between any telephone system operated by it, and the telephone toll line operated by another such public utility, or between its toll line and the telephone system of another such public utility, or between its toll line and the toll line of another such public utility, or between its telephone system and the telephone system of another such public utility, whenever public convenience and necessity require such physical connections, and such physical connections will not result in irreparable injury to the owners or other users of the facilities of such public utilities, nor in any substantial detriment to the service to be rendered by such public utilities. The term "physical connection," as used in this section, shall mean such number of trunk lines or complete wire circuits and connections as may be required to furnish reasonably adequate telephone service between such public utilities.

(2) In case of failure to agree upon such use or the conditions or compensation for such use, or in case of failure to agree upon such physical connections, or the terms and conditions upon which the same shall be made, any public utility or any other person interested may apply to the commission, and if after investigation the commission shall ascertain that public convenience and necessity require such use or such physical connections, and that such use or such physical connections would not result in irreparable injury to the owner or other users of such equipment or of the facilities of such public utilities, nor in any substantial detriment to the service to be rendered by such owner or such public utilities or other users of such equipment or facilities, it shall by order direct that such use be permitted and prescribe reasonable conditions

and compensation for such joint use, and that such physical connections be made, and determine how and within what time such connections shall be made, and by whom the expense of making and maintaining such connections shall be paid.

(3) Such use so ordered shall be permitted and such physical connections so ordered shall be made, and such conditions and compensation so prescribed shall be the lawful conditions and compensation for such use, and the lawful terms and conditions upon which such physical connections shall be made, observed, followed and paid. Any such order may be, from time to time, revised by the commission.

(4) Provided the parties cannot agree and the commission finds that public convenience and necessity or the rendition of reasonably adequate service to the public requires that a public utility should be permitted to extend its lines on, over or under the right of way of any railroad or requires that the tracks of any railroad should be extended on, over or under the right of way of any public utility, the commission is empowered to order such extension by said public utility or railroad on, over or under the right of way of the other when it will not materially impair the ability of the railroad or utility, on, over or under whose right of way such extension would be made, to serve the public. Such use so ordered shall be permitted upon such conditions and such compensation as the commission shall deem equitable and reasonable in the light of all the circumstances, which conditions and compensation so prescribed shall be the lawful conditions and compensation for such use and the lawful terms and conditions upon which such use shall be made, observed, followed and paid.

Wis. Stat. Ann. § 196.05 (1957):

(1) Whenever the commission shall deem it either proper or necessary in the interest of effective regulation, the commission shall value or revalue all the property of every public utility actually used and useful for the convenience of the public.

Wis. Stat. Ann. § 196.09 (1957):

(1) Every public utility shall file with the commission, within such time as may be required by the commission, its estimate of the average annual rate of depreciation required for each of its classes of fixed capital used for public utility purposes, and of the composite annual rate of depreciation required for such fixed capital as an aggregate, which shall constitute the public utility's estimates of the amount which should be returned to it out of its rates for service, to meet the depreciation of its property.

(2) After the submission of such estimates, the commission shall review the same. If it shall determine that the estimates submitted are reasonable and proper, it shall certify that determination to the public utility. If it shall determine that the estimates submitted are not reasonable and proper, it shall certify to the public utility the percentages which it considers reasonable and proper. In case the fixed capital accounts of the public utility are not so subdivided as to permit the rates for the various classes of fixed capital used for public utility purposes to be applied, the estimates submitted by the public utility and the percentages determined by the commission may be based upon the aggregate of such fixed capital.

(3) After the commission shall have certified to the public utility its findings as to the percentages required for depreciation, such public utility shall have thirty days within which to make application to the commission for a hearing and order. If the public utility does not make application to the commission for a hearing and order within the time set, the commission's certification of findings shall have the effect of an order and the public utility shall have the right of appeal therefrom as provided in this chapter.

(4) The commission may provide, in order to meet changing conditions, that public utilities shall submit the estimates herein referred to from time to time, and in case it requires such resubmission of estimates, it shall follow the procedure with reference to certifying its findings as provided above. In revising the reasonable and proper percentages of depre-

ciation the commission shall give consideration to the experience of the public utility in accumulating a depreciation reserve under previous rates, the retirements actually made, and such other factors as may be relevant.

(5) When the commission shall have established, by certification or order, the reasonable and proper percentages of depreciation, such percentages shall constitute the percentages to be used in any proceeding involving the rates or practices of such public utility, provided that if at the time of such proceeding it is found that the percentages of depreciation previously established are no longer reasonable and proper the commission shall establish reasonable and proper percentages for the purpose of such proceeding and certify such new percentages in the manner provided by this section.

(6) When the comission shall have established for any public utility, by certification or order, the percentages necessary for depreciation on fixed capital used for public utility purposes, such public utility shall credit to its depreciation reserve in each accounting period such amount as may be required to provide for depreciation at the percentage or percentages established. If the public utility is a corporation it shall be unlawful for such corporation to pay any dividend out of earnings for any fiscal period subsequent to the commission's certification or order, or carry any portion of its earnings to its surplus account, except out of earnings remaining after crediting its depreciation reserve in accordance with the rates established by the commission; provided, that after application and hearing the commission may, upon a finding that it is necessary in the public interest, exempt a public utility from the duty of crediting to the depreciation reserve in any accounting period a greater amount than is possible without impairing its ability to pay dividends for the current calendar year. Nothing in this section shall be construed to modify the requirements of s. 180.38.

(7) If a public utility desires to account for depreciation on a sinking fund basis and the commission determines that such basis of accounting for depreciation may reasonably be employed, the commission shall establish, in the manner herein

before referred to, the composite rate to be applied to the aggregate fixed capital used for public utility purposes to determine the amount which shall be charged to operating expenses, and the interest rate applicable to the reserve balance at which additional credits to the reserve shall be computed. In such cases the total amount to be credited to the reserve shall be the amount charged to operating expenses, plus the amount obtained by applying the interest rate to the reserve balance. Public utilities which account for depreciation on a sinking fund basis shall be subject to the same restrictions and regulations in their accounting for the entire amounts to be credited to the depreciation reserve as are applicable to those public utilities which make the entire provision for depreciation by other methods permitted herein.

(8) No public utility shall charge to its depreciation reserve anything except losses on property actually retired from service.

Wis. Stat. Ann. § 196.37 (1957 & Supp. 1982):

(1) Whenever upon an investigation made under this chapter and ch. 197, the commission shall find rates, tolls, charges, schedules or joint rates to be unjust, unreasonble, insufficient or unjustly discriminatory or preferential or otherwise unreasonable or unlawful, the commission shall determine and by order fix reasonable rates, tolls, charges, schedules or joint rates to be imposed, observed and followed in the future in lieu of those found to be unreasonable or unlawful.

(2) Whenever the commission shall find any regulations, measurements, practices, acts or service to be unjust, unreasonable, insufficient, preferential, unjustly discriminatory or otherwise unreasonable or unlawful, or shall find that any service is inadequate, or that any service which can be reasonably demanded cannot be obtained, the commission shall determine and by order fix reasonable measurements, regulations, acts, practices or service to be furnished, imposed, observed and followed in the future in lieu of those found to be unreasonable, inadequate or otherwise unlawful, and shall make such other order respecting such measure-

ment, regulation, act, practice or service as shall be just and reasonable.

Wis. Stat. Ann. § 196.375 (Supp. 1982):

Upon complaint by any party affected, setting forth that any grantee of permit to develop hydraulic power and generate hydroelectric energy for sale or service to the public is not furnishing citizens of this state with adequate service at a reasonable rate in consequence of sales of such energy outside of the state, the commission shall have power to declare any or all contracts entered into by said grantee for such sales null and void in so far as they interfere with such service or rate. Such declaration shall be made only after a hearing and investigation and a recorded finding that convenience and necessity require the sale of a specified part or all such energy within this state.

Wis. Stat. Ann. § 196.38 (1957):

All public utilities to which the order applies shall make such changes in their schedules on file as may be necessary to make the same conform to said order, and no change shall thereafter be made by any public utility in such rates, tolls or charges, or joint rates, without the approval of the commission.

Wis. Stat. Ann. § 196.49 (1957 & Supp. 1982):

(1) No public utility not legally engaged in performing a public utility service on August 1, 1931, in any municipality where there is not in operation under an indeterminate permit a public utility engaged in similar service, shall commence the construction of any public utility plant, extension or facility, or render service in such municipality directly, or indirectly by serving any other public utility or agency engaged in public utility service or otherwise, unless and until it shall have obtained a certificate from the commission authorizing it to transact public utility business.

(2) No public utility shall begin the construction, installation or operation of any new plant, equipment, property or facility, nor the construction or installation of any extension, improvement or addition to its existing plant, equipment, property, apparatus or facilities unless and until it shall have complied with any applicable general or special order of the commission. If a co-operative association has been incorporated under chapter 185 for the production, transmission, delivery or furnishing of light or power and has filed with the commission a map of the territory to be served by such association and a statement showing that a majority of the prospective customers in the area are included in the project, no public utility shall begin any such construction, installation or operation within said territory until after the expiration of six months from the date of the filing of said map and notice. In the event said co-operative association has entered into a loan agreement with any federal agency for the financing of its proposed system and has given written notice thereof to the commission, no public utility shall begin any such construction, installation or operation within said territory until after the expiration of twelve months from the date of said loan agreement.

(3) The commission may provide by general or special order that any public utility shall submit, periodically or at such times as the commission shall specify and in such detail as the commission shall require, plans, specifications and estimated costs of such proposed construction of any new plant, equipment, property or facility, or such extension, improvement or addition to its existing plant, equipment, property, apparatus or facilities as the commission finds will materially affect the public interest.

(4) In such general or special order the commission may provide that no such project as herein described shall proceed until the commission has certified that public convenience and necessity require such work; but, such general or special order shall not require such certificate for the completion of the construction and installation of plants and facilities upon which construction work has begun prior to June 7, 1931 or for which contracts may have been entered into prior to such

date. The commission may refuse such certificate if it appears that the completion of such project (a) will substantially impair the efficiency of the service of such public utility; (b) provides facilities unreasonably in excess of the probable future requirements; or (c) will, when placed in operation, add to the cost of service without proportionately increasing the value or available quantity thereof unless the public utility shall waive consideration by the commission, in the fixation of rates, of such consequent increase of cost of service. The commission shall have power to issue a certificate for such project or for such part thereof as complies with the requirements of this section, or the commission may attach to the issuance of its certificate such terms and conditions as will insure that the project meets the requirements of this section. The certificate issued, here under, shall not be a condition precedent to the exercise of eminent domain under ch. 32.

(5) (a) No public utility furnishing gas to the public in this state shall construct, install or place in operation any new plant, equipment, property or facility, or construct or install any extension, improvement, addition or alteration to its existing plant, equipment, property or facilities for the purpose of connecting its properties and system to a source of supply of gaseous fuel for sale to the public which is different from that which has been theretofore sold, or for the purpose of adapting its facilities to such different kind of gaseous fuel unless and until the commission shall have found and certified that the general public interest and public convenience and necessity require the same; nor shall any such public utility substitute natural gas or a mixture or natural and manufactured gas in lieu of manufactured gas for distribution and sale to the public without first having obtained from the commission a certificate that the general public interest and public convenience and necessity require the same.

(b) Proceedings for such a certificate shall be commenced by petition to the commission in such form and furnishing such information is the commission shall by general or special order prescribe. The commission shall also prescribe

the form of notice, to whom the same shall be given, and how notice shall be given.

(c) A petition may include one or more municipalities, may be made by one or more utilities as a joint petition, or by any other person or corporation interested or by a utility and such other person or corporation so interested, and the commission may direct the consolidation, separation or consideration of separate petitions as it may deem necessary or expedient to a prompt hearing and disposition of the issue.

(d) Upon the filing of such petition, notice of hearing thereon shall be given by any utility or person filing such petition by publication in of a class 2 notice, under ch. 985, by mailing or personal service, as the commission directs by the order provided for in paragraph (b). Such notice shall be given, as herein provided, at least 2 weeks prior to hearing on such petition and proof thereof filed as directed by the commission.

(e) The commission may by order prior to or during any hearing frame and prescribe special issues and limit the issues or the nature and extent of proof so as to avoid unnecessary duplication or may proceed with the hearing as to part of an application as it may find desirable to a full but speedy hearing upon such petition.

(f) The commission may likewise accept the findings and orders of the federal power commissioner any other federal agency having jurisdiction as to the availability of adequate supplies of natural gas, the adequacy or sufficiency of equipment and facilities to be employed in the delivery or storage of natural gas for any utility, and any similar findings or determinations affecting the seller or person or corporation furnishing such natural gas to any utility and material to the ultimate determination of the issues in such proceeding as presumptive evidence of the facts so found, and may likewise accept and take judicial notice of its own files and records, including all proceedings and the evidence therein which it may find to be material and relevant, provided, however, that in any such event the commission shall give notice of such fact prior to the conclusion of final

hearings upon any proceedings so as to give interested parties the right to object to the acceptance of such evidence or to contradict the same by other competent evidence.

(g) The certificate, when granted, shall be authorized by an order following such hearing which shall contain such conditions and limitations as the commission may deem necessary or practicable, including exceptions or regulations as to specific communities or utilities, provision for protection of employes under existing labor contracts, as well as other employes, so as to avoid unemployment, regulations for accounting for expenses for change-over to the use of natural gas where necessary and to the extent necessary, provisions for amortization of any expenditure or other items, and such other regulations, conditions and limitations as the commission may consider necessary in the public interest.

(h) Any certificate may extend to one or more utilities or one or more municipalities when so directed by the order, and may prescribe different conditions and regulations for each, as the commission shall deem necessary to carry out the purposes of this section.

(i) In making its determination, the commission shall give due consideration, among all other appropriate factors, to all matters affecting the public interest, including when the substitution of natural or a mixture of natural and manufactured gas in lieu of manufactured gas, is involved, the social and economic effects thereof by reason of its effect upon employment, existing business and industries, railroads and other transportation agencies and facilities, conveniences, economies and savings to consumers, the likelihood of substantial rate reductions, the effect upon existing gas utilities and their ability to continue to serve the public, the state, any of its political subdivisions or any citizen or resident thereof.

(6) If the commission shall find that any public utility has undertaken or is about to undertake such a project as is herein described in violation or disregard of such general or special order, the commission may in its own name either

before or after investigation or public hearing and either before or after issuing any additional orders or directions as it may deem proper, bring an action in the circuit court of Dane county to enjoin such violation or disregard of such order. Where necessary to preserve the status quo the court may issue a temporary injunction pending a hearing upon the merits. From any such order or judgment of the circuit court an appeal may be taken to the supreme court as provided in chapter 274.

Wis. Stat. Ann. § 196.50 (1957 & Supp. 1982):

(1) No license, permit or franchise shall be granted to own, operate, manage or control any plant or equipment for the conveyance of telephone messages, or telegraph messages, or for the production, transmission, delivery or furnishing of heat, light, water or power in any municipality, if there is in operation under an indeterminate permit a public utility engaged in similar service, without first securing from the commission a declaration, after a public hearing of all parties interested, that public convenience and necessity require such second public utility. This subsection shall not prevent or impose any condition upon the extension of any telephone toll line from any municipality into or through any municipality for the purpose of connecting with any telephone exchange in such municipality or connecting with any other telephone line or system.

(2) No public utility furnishing telephone service shall install or extend any telephone exchange for furnishing local service in any town where there is a public utility engaged in similar service, without first having served notice in writing upon the commission and such other public utility of the installation or extension of such exchange which it proposes to make, or make such installation or extensions if the commission, within twenty days after the service of such notice, shall, upon investigation, find and declare that public convenience and necessity do not require the installation or extensions of such exchange. Any public utility already engaged in furnishing local service to subscribers within any

city or village may extend its exchange within such city or village without the authority of the commission. Any public utility operating any telephone exchange in any city or village shall, on demand, extend its lines to the limits of such city or village for the purposes mentioned and subject to the conditions and requirements prescribed in section 196.04 and 196.19 subsections (4) and (5).

(3) Any permit, license or franchise which shall contain any term whatsoever interfering with the existence of a second public utility is hereby amended in such manner as to permit any municipality to grant a franchise for the operation of such second public utility.

(4) No municipality shall hereafter construct any public utility where there is in operation under an indeterminate permit in such municipality a public utility engaged in similar service, without first securing from the commission a declaration, after a public hearing of all parties interested, that public convenience and necessity require such municipal public utility.

(5) Pending investigation and finding by the commission as to whether public convenience and necessity require a second utility, the furnishing of any public utility service in any municipality contrary to the provisions of this section may be enjoined at the suit of the state or of any public utility having an interest therein.

(6) No certificate of convenience and necessity or permit to any public utility under sections 196.49 and 196.50 shall be denied by reason of the amount of its notes, bonds or other evidences of indebtedness issued to the United States of America in connection with loans for rural telephone facilities made under the rural electrification act of 1936, as amended, or by reason of the ratio of such indebtedness to the value of its property or to its other classes of securities.

Wis. Stat. Ann. § 196.52 (1957):

(1) "Affiliated interests" with a public utility means and includes the following:

(a) Every corporation and person owning or holding directly or indirectly five per centum or more of the voting securities of such public utility.

(b) Every corporation and person in any chain of successive ownership of five per centum or more of voting securities.

(c) Every corporation five per centum or more of whose voting securities is owned by any person or corporation owning five per centum or more of the voting securities of such public utility or by any person or corporation in any such chain of successive ownership of five per centum or more of voting securities.

(d) Every person who is an officer or director of such public utility or of any corporation in any chain of successive ownership of five per centum or more of voting securities.

(e) Every corporation operating a public utility, a railroad, or a servicing organization for furnishing supervisory, construction, engineering, accounting, legal and similar services to utilities or railroads, which has one or more officers or one or more directors in common with such public utility, and every other corporation which has directors in common with such public utility where the number of such directors is more than one-third of the total number of the utility's directors.

(f) Every corporation or person which the commission may determine as a matter of fact after investigation and hearing is actually exercising any substantial influence over the policies and actions of such public utility even though such influence is not based upon stockholding, stockholders, directors or officers to the extent specified in this section.

(g) Every person or corporation who or which the commission may determine as a matter of fact after investigation and hearing is actually exercising such substantial influence over the policies and actions of such public utility in conjunction with one or more other corporations and/or persons with which or whom they are related by ownership and/or blood relationship or by action in concert that together they are affiliated with such public utility within

the meaning of this section even though no one of them alone is so affiliated.

(2) Provided, however, that in the foregoing subsection the term "person" shall not be construed to exclude trustees, lessees, holders of beneficial equitable interest, voluntary associations, receivers and partnerships.

(3) (a) No contract or arrangement providing for the furnishing of management, supervisory construction, engineering, accounting, legal, financial or similar services, and no contract or arrangement for the purchase, sale, lease or exchange of any property, right, or thing, or for the furnishing of any service, property, right, or thing, other than those above enumerated, made or entered into after June 7, 1931 between a public utility and any affiliated interest as defined in this chapter, shall be valid or effective unless and until such contract or arrangement shall have recieved the written approval of the commission. It shall be the duty of every public utility to file with the commission a verified copy of any such contract or arrangement, or a verified summary of any such unwritten contract or arrangement, and also of all such contracts and arrangements, whether written or unwritten, entered into prior to said date and in force and effect at that time. The commission shall approve such contract or arrangement made or entered into after said date only if it shall clearly appear and be established upon investigation that is is reasonable and consistent with the public interest; otherwise the contract or arrangement shall not be approved. No such contract or arrangement shall receive the commission's approval unless satisfactory proof is submitted to the commission of the cost to the affiliated interest of rendering the services or of furnishing the property or service described herein to each public utility. No proof shall be satisfactory within the meaning of the foregoing sentence unless it includes the original (or verified copies) of the relevant cost records and other relevant accounts of the affiliated interest, or such abstract thereof or summary taken therefrom as the commission may deem adequate, properly identified and duly authenticated, provided, however, that the commission

may, where reasonable, approve or disapprove such contracts or arrangements without the submission of such cost records or accounts.

(b) The provisions of this section requiring the written approval of the commission shall not apply to transactions with affiliated interests where the amount of consideration involved is not in excess of $10,000 or 5 per cent of the par value of outstanding common stock, whichever is smaller; provided, however, that regularly recurring payments under a general or continuing arrangement which aggregate a greater annual amount shall not be broken down into a series of transactions to come within the aforesaid exemption. Such transactions shall be valid or effective without commission approval under this section. However, in any proceeding involving the rates or practices of the public utility, the commission may exclude from the accounts of such public utility any payment or compensation made pursuant to such transaction unless the public utility shall establish the reasonableness of such payment or compensation.

(4) In any proceeding, whether upon the commission's own motion or upon application or complaint, involving the rates or practices of any public utility, the commission may exclude from the accounts of such public utility any payment or compensation to an affiliated interest for any services rendered or property or service furnished, as above described, under existing contracts or arrangements with such affiliated interest unless such public utility shall establish the reasonableness of such payment or compensation. In such proceeding the commission shall disallow such payment or compensation, in whole or in part, in the absence of satisfactory proof that it is reasonable in amount. In such proceeding no payment or compensation shall be approved or allowed by the commission, in whole or in part, unless satisfactory proof is submitted to the commission of the cost to the affiliated interest of rendering the service or furnishing the property or service above described to each public utility. No proof shall be satisfactory, within the meaning of the foregoing sentence, unless it includes the original (or verified copies) of

the relevant cost records and other relevant accounts of the affiliated interest, or such abstract thereof or summary taken therefrom as the commission may deem adequate, properly identified and duly authenticated; provided, however, that the commission may, where reasonable, approve or disapprove such contracts or arrangements without the submission of such cost records or accounts.

(5) The commission shall have continuing supervisory control over the terms and conditions of such contracts and arrangements as are herein described so far as necessary to protect and promote the public interest. The commission shall have the same jurisdiction over the modifications or amendment of contracts or arrangements as are herein described as it has over such original contracts or arrangements. The fact that the commisssion shall have approved entry into such contracts or arrangements as described herein shall not preclude disallowance or disapproval of payments made pursuant thereto, if upon actual experience under such contract or arrangement it appears that the payments provided for or made were or are unreasonable. Every order of the commission approving any such contract or arrangement shall be expressly conditioned upon the reserved power of the commission to revise and amend the terms and conditions thereof, if, when and as necessary to protect and promote the public interest.

(6) Whenever the commission shall find upon investigation that any public utility is giving effect to any such contract or arrangement without such contract or arrangement having received the commission's approval as required by this section, the commission shall issue a summary order directing the public utility to cease and desist from making any payments or otherwise giving any effect to the terms of such contract or arrangement, until such contract or arrangement shall have received the approval of the commission. The circuit court of Dane county is authorized to enforce such order to cease and desist by appropriate process, including the issuance of a preliminary injunction, upon the suit of the commission.

(7) Whenever the commission shall find upon investigation

that any public utility is making payments to an affiliated interest, although such payments have been disallowed and disapproved by the commission in a proceeding involving the public utility's rates or practices, the commission shall issue a summary order directing the public utility to cease and desist from making such payments. The circuit court of Dane county is authorized to enforce such order to cease and desist by appropriate process, including the issuance of a preliminary injunction, upon the suit of the commission.

Wis. Stat. Ann. § 196.605 (1957 & Supp. 1982):

(1) Notwithstanding any other provision of this chapter, any public utility which is a co-operative association incorporated under ch. 185 to furnish telephone service in rural areas on a nonprofit basis with a telephone system financed in part through a loan or loans from United States of America under the rural electrification act of 1936, as amended, may require each of its local service telephone patrons to deposit with the association the amount of the membership fee or other form of capital representing the proportional share of the total equity capital of the association required as a condition of such federal financing. Such membership fee or other form of equity capital attributable to each local service patron may be collected by the association in instalments in connection with billings for service. Such required deposits of equity capital shall be segregated in the billing from service charges and shall be credited when received on the membership or equity capital account of the patron.

(2) The amount of the membership fee or equity capital to be so required of each local service telephone patron may be based upon reasonable classifications of service and appropriate factors relating to the cost of rendition of such service. Such amounts, classifications and the manner of collecting such amounts shall be subject to the approval of the commission and the commission is authorized to promulgate rules pertaining thereto.

Wis. Stat. Ann. § 196.79 (1957 & Supp. 1982):

Reorganizations of all public utilities shall be subject to the supervision and control of the commission, and no such reorganization shall be had or given effect without the written approval of the commission. No plan of reorganization shall be approved by the commission unless it is established by the applicant for such approval that the plan of reorganization is consistent with the public interest.

Wis. Stat. Ann. § 196.80 (1957 & Supp. 1982):

(1) With the consent and approval of the commission but not otherwise:

(a) Any two or more public utilities or any two or more public utilities owning or operating street railway or interurban railway lines may consolidate with each other.

(b) Any public utility or any public utility owning or operating a street railway or interurban railway may acquire the stock of any other public utility or any part thereof.

(c) Any public utility or any public utility owning or operating a street railway or interurban railway owning all the stock of any other public utility or any other public utility owning or operating a street railway or interurban railway line may file in the office of the secretary of state a certificate of such ownership, in its name and under its corporate seal, signed by its president or a vice president and its secretary or treasurer, and setting forth a copy of the resolution of its board of directors to merge such other corporation and to assume all of its obligations, and the date of the adoption of such resolution. Thereupon all of the estate, property rights, privileges and franchises of such other corporation shall vest in and be held and enjoyed by such possessor corporation as fully and entirely and without change or diminution as the same were before held and enjoyed by such other corporation, and be managed and controlled by such possessor corporation, but subject to all liabilities and obligations of such other corporation and the rights of all creditors thereof. The possessor

corporation shall be deemed to have assumed all the liabilities and obligations of the merged corporation, and shall be liable in the same manner as if it had itself incurred such liabilities and obligations. The possessor corporation may relinquish its corporate name and assume in place thereof the name of the merged corporation by including a provision to that effect in the resolution of merger adopted by the board of directors and set forth in the certificate of ownership and upon the filing of such certificate the change of name shall be complete.

(d) Any public utility may sell, acquire, lease or rent any public utility plant or property constituting an operating unit or system.

(2) Nothing in this section shall be construed as affecting or limiting the operation of sections 197.01 to 197.10 or of sections 66.06 to 66.078 of the statutes.

(3) Application for the approval and consent of the commission shall be made by the interested public utility or the interested public utility owning or operating the street railway or interurban railway line, and shall contain a concise statement of the proposed action, the reasons therefor and such other information as may be required by the commission. Upon the filing of such application the commission shall investigate the same, with or without public hearing, and in case of a public hearing upon such notice as the commission may require, and if it shall find that the proposed action is consistent with the public interest it shall give its consent and approval in writing. In reaching its determination the commission shall take into consideration the reasonable value of the property and assets of the corporation to be acquired or merged.

(4) (a) No consolidation as authorized by subsection (1) of this section shall be effective unless a written plan of consolidation shall be approved by at least a two-thirds vote of each class of stock, and each issue, series or kind of preferred stock of each of the constituent companies at meetings of the stockholders of such respective constituent companies called for the purpose of acting upon the proposed

plan on not less than 30 days' notice by mail to each stockholder at his last address appearing on the records of the corporation and on not less than 3 weeks' publication of notice of meeting in a general newspaper published in the cities of Wisconsin in which is located the principal office of the respective constituent corporations.

(b) No such consolidation shall be effective unless the public service commission shall find that the plan of consolidation is just and reasonable in its effect on stockholders and creditors of each of the constituent companies and is consistent with public interest. Notice of hearing on application for commission approval of a proposed plan of consolidation shall be given by publication for at least 3 weeks in a newspaper of general circulation in Wisconsin as may be designated by the commission as best adapted to apprise the stockholders of such meeting. The order of approval may precede or follow the vote of the stockholders or one or more of the constituent companies in respect to approval of the plan of consolidation.

(c) 1. The written plan of consolidation shall specify the name of the constituent company which is to be adopted by the consoldiated company and the directors and officers of the consolidated company who shall first serve until the first annual meeting of the stockholders of the consolidated company or until their respective successors are duly elected and qualified.

2. The plan of consolidation may provide for the procedure set forth in subparagraphs a or b hereunder of this paragraph or such other plan as the commission may approve.

a. The authorized capital stock and the issued capital stock, the authorized number of shares, and the issued number of shares of the consolidated company shall be the same as the authorized aggregate capital stock and the authorized aggregate number of shares, the issued capital stock and the issued number of shares of the constituent companies before consolidation and the preferred stock and each issue, series and kind thereof of each constituent company shall retain its dividend

rate and redemption price, if any, and shall be given no other preference over any of the preferred stock of the consolidated company; but nothing in this subsection shall be construed as preventing the consolidated company from extending to all of the preferred stock of the constitutent companies so aggregated the most favorable provisions as to voting rights upon default, restrictions on the borrowing power of the issuing corporation and other like restrictions specified in respect to any of the preferred stock of any constituent corporation and other provisions, if any, required by public official authority having jurisdiction in the premises. Preferred stock of each constituent company shall become preferred stock of like par value, dividend rate and redemption price, if any, of the consolidated company, and the common stock of each constituent company shall become common stock of like par value of the consolidated company.

b. All of the outstanding capital stock, both preferred and common, of the constituent companies may be surrendered and cancelled and the consolidated company may issue any class or classes of preferred stock, or common stock, or both, or offer cash in exchange for the capital stock held by the stockholders of the constituent companies.

(d) No such consolidation shall be effective except upon the filing with the secretary of state of:

1. Articles of incorporation of the consolidated company prepared in accordance with this subsection and with authorized capital stock aggregating the authorized capital stock of the constituent companies, and with powers aggregating the corporate powers of the constituent corporations, and specifying the number constituting the board of directors, their term of office and the manner of their election, and otherwise complying with the requirements of s. 180.45, accompanied by the usual fee for filing articles of incorporation or amendments thereof but after crediting the amounts paid by the respective constituent companies in respect of authorized capital

stock, which articles of incorporation shall be signed and acknowledged by the president and secretary of each of the constituent companies at the time of consolidation and filed and recorded in the manner specified in s. 180.46, for which purpose copies of articles of incorporation may be verified by the oaths of any 2 of the signers.

2. A copy of the resolution of the stockholders of each constituent company adopting the plan of consolidation duly certified in the manner specified in s. 180.53.

3. A duly certified copy of the order of the commission approving the plan of consolidation.

(e) The secretary of the state upon the filing and recording in the manner specified by s. 180.46 of the articles of incorporation of the consolidated company shall issue a certificate of incorporation to the consolidated company and thereupon the corporate existence of the constituent companies shall cease, but the consolidated company so formed shall hold and enjoy all of the powers, privileges, rights, franchises, properties, estates and choses in action which at the time of such union were held and enjoyed by any of the constituent companies as fully and entirely and without change or diminution as the same were before held and enjoyed by the constituent company, and it shall be subject to all contracts, liabilities, and obligations existing against the constituent companies; and all actions at law or pending suits and other proceedings instituted by or against any of the constituent companies shall be continued by or against the consolidated company. All mortgages or other liens upon the property of any of the constituent companies shall continue as a lien against such property and such additions thereto, if any, as may be contemplated by the instrument creating such lien. The consolidated company may execute any supplementary indenture or other like instrument consistent with the provisions of this subsection which may be required to be executed in the event of the consolidation of the mortagagor by the terms of any mortgage or other like instrument executed by a constituent company.

(f) Any preferred stockholder of any constituent company

entering into any consolidation pursuant to this subsection who shall have dissented from the proposed consolidation and shall have recorded such dissent at the meeting of the stockholders at which the plan of consolidation was approved, shall have the right upon written notice to the consolidated company within 60 days of the completion of the consolidation to receive at the expiration of one year from the completion of such consolidation and upon the surrender of a certificate or certificates representing such stock duly indorsed in blank, all unpaid dividends accruing since the date of the consolidation and unpaid dividends accruing prior thereto, if such dividends be cumulative, together with the redemption price, if any, specified in respect of such stock, and if no redemption price be specified, then the par value thereof. The preferred stock so acquired need not be cancelled or retired but may be held by the consolidated company as reacquired stock and mortagaged, pledged or otherwise disposed of.

(g) Any holder of common stock of any constituent company entering into any consolidation pursuant to this subsection who shall have dissented from the proposed consolidation and have recorded such dissent at the meeting of the stockholders at which the plan of consolidation was approved, shall have the right upon written notice to the consolidated company within 60 days of the completion of the consolidation to receive at the expiration of one year from such completion of the consolidation and upon the surrender of a certificate or certificates representing such stock duly indorsed in blank, the fair value of such stock as fixed by the commission after hearing upon the application of a holder of common stock or upon application by the consolidated company. Upon any such application, notice shall be given to all dissenting stockholders of common stock by publication for at least 3 weeks in advance of such hearing in a newspaper of general circulation in Wisconsin as may be designated by the commission as best adapted to apprise the dissenting stockholders of such hearing. Any such determination of the commission shall be subject to judicial review as provided by this chapter in respect to other orders of the commission. The commission

or court in fixing such value may adjust the same for reasonably probable interim earnings which may remain undistributed between the date of the determination and the expiration of said period of one year. Common stock so acquired need not be cancelled or retired but may be held by the consolidated company as reacquired stock and thereafter sold or otherwise disposed of.

(h) The certificates representing the preferred or common stock of any constituent company, except stock held by dissenting stockholders who are provided for in paragraphs (f) and (g) of this subsection, may be exchanged at the option of the consolidated company for certificates of stock issued by it. After consolidation shall have been consummated and until such exchange, the certificates of stock of the constituent company shall represent stock of the consolidated company in the amount and of the character and kind described in such respective certificate or certificates.

(5) Any transaction required herein to be submitted to the commission for its consent and approval shall be void unless the commission shall give its consent and approval thereto in writing.

(6) The enumeration of powers, duties and authority conferred by this section shall not be construed as limiting any powers conferred upon the commission before June 27, 1935 by statutes then existing.

Wis. Stat. Ann. § 196.81 (1957 & Supp. 1982):

No public utility may abandon or discontinue any line, branch line or extension or service thereon without first securing the approval of the commission. In granting its approval, the commission may impose such terms, conditions or requirements as it deems necessary to protect the public interest. Any public utility or railroad abandoning or discontinuing in pursuance of authority granted by the commission shall be deemed to have waived any and all objections to the

terms, conditions or requirements imposed by the commission in that regard. Nothing herein contained, however, shall be construed to eliminate the necessity of obtaining the consent of the proper municipal authorities as acquired by section 193.11. The provisions of this section shall apply only so far as the constitution and laws of the United States permit.

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Nos. 82-952, 82-953, 82-992, and 82-1001

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF MARYLAND, ET AL., APPELLANTS
v.
UNITED STATES OF AMERICA, ET AL.

TANDY CORPORATION, APPELLANT
v.
UNITED STATES OF AMERICA, ET AL.

NORTH AMERICAN TELEPHONE ASSOCIATION, APPELLANT
v.
UNITED STATES OF AMERICA, ET AL.

STATE OF ILLINOIS, APPELLANT
v.
UNITED STATES OF AMERICA, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

REX E. LEE
Solicitor General

WILLIAM F. BAXTER
Assistant Attorney General

RONALD G. CARR
Deputy Assistant Attorney General

BARRY GROSSMAN
ROBERT B. NICHOLSON
NANCY C. GARRISON
ROBERT J. WIGGERS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether structural relief found by a federal district court to be necessary to remedy Sherman Act violations in interstate telecommunications markets can be negated by state regulatory statutes requiring state approval of asset transfers and otherwise regulating intrastate communications.

2. Whether the district court erred in concluding that the consent decree entered in this case was in the public interest.

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ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

OPINIONS BELOW

The August 11, 1982, opinion of the district court stating that it would approve the decree only if modified in certain respects (J.S. App. 1-172)[1] is not yet officially reported. The August 23, 1982, opinion of the district court denying reconsideration of the customer premises equipment amendments (J.S. App. 195-200) is not reported. The Modification of Final Judgment entered August 24, 1982 (J.S. App. 173-190) is not reported. The order of the district court, dated November 10, 1982, granting certification (J.S. App. 204-208) is not reported.

JURISDICTION

The Modification of Final Judgment was entered on August 24, 1982 (J.S. App. 173), and the order granting intervention to the appellants was entered on August 26, 1982 (J.S. App. 191-194). The notices of appeal were filed between October 25, 1982, and November 5, 1982 (J.S. App. 209-240). On November 10, 1982, the district court certified that direct appeal of this case to the Supreme Court is of general public importance in the administration of justice (J.S. App. 204-208). The Chief Justice extended the time for docketing an appeal for all appellants to and including December 8, 1982, and the appeals were docketed on that date. The jurisdiction of this Court is invoked under 15 U.S.C. 29(b).

STATEMENT

1. In 1949 the United States sued Western Electric Company, Inc., and its parent, American Telephone and Telegraph Company, Inc. ("AT&T"), claiming that the defendants had monopolized and conspired to restrain trade in the manufacture and distribution of telephone equipment in violation of Sections 1 and 2 of the Sherman

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[1] "J.S. App." refers to the Joint Appendix to Jurisdictional Statements.

Act, 15 U.S.C. 1 and 2. *United States* v. *Western Electric Co.*, Civ. No. 17-49 (D.N.J., filed Jan. 14, 1949). The gist of the complaint was that AT&T had unlawfully extended its original monopoly on telephone equipment to control the market for telephone services, and then had used its power in the services market to reinforce its control over the equipment market. The complaint sought the divestiture of Western Electric as a means of eliminating AT&T's monopoly in the equipment market.

Before trial, the parties settled the case by a consent decree, which the district court entered in 1956. The decree prohibited AT&T and the affiliated Bell Operating Companies ("BOCs") from engaging "in any business other than the furnishing of common carrier communications services" (82-953 J.S. App. 6a), defined as "services and facilities * * * the charges for which are subject to public regulation under the Communications Act of 1934" or under state law (82-953 J.S. App. 4a).[2] The decree also required the licensing of Bell System patents to all applicants at reasonable royalties (*id.* at 5a, 8a-9a).

2. In 1974 the government again sued AT&T and Western Electric. *United States* v. *American Telephone*

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[2] In 1980 the Federal Communications Commission ruled that AT&T and other telecommunications common carriers were free under the Communications Act of 1934, 47 U.S.C. (& Supp. IV) 151 *et seq.*, to provide services other than basic transmission services ("enhanced services") and to sell customer premises equipment, without rate regulation by the Commission. *In re Amendment of Section 64.702 of the Commission's Rules & Regulations*, 77 F.C.C.2d 384, on reconsideration, 84 F.C.C.2d 50 (1980), on further reconsideration, 88 F.C.C.2d 512 (1981), aff'd, *Computer & Communications Industry Association* v. *FCC*, No. 80-1471 (D.C. Cir. Nov. 12, 1982) ("*Computer II*"). AT&T then persuaded the New Jersey district court to construe the *Western Electric* decree to permit it to take advantage of the *Computer II* decision. 531 F. Supp. 894 (D.N.J. 1981). The government's appeal from the district's court's order (No. 81-2837 (3d Cir. filed Oct. 30, 1981)), was pending at the time that AT&T and the government agreed to the proposed modification of the decree, which, as further modified, is appealed from here.

& Telegraph Co., Civ. No. 74-1698 (D.D.C. Nov. 20, 1974).[3] The government contended that, in violation of Section 2 of the Sherman Act, 15 U.S.C. 2, AT&T had used its monopoly power in local exchange telephone service to exclude competition in the telecommunications equipment and intercity services markets. In particular, the complaint alleged that AT&T had monopolized customer premises equipment by discriminating against competitors' equipment, had monopolized telecommunications equipment used by the BOCs through various preferential devices, and had monopolized intercity telecommunications through discriminatory refusals to interconnect with other companies and discriminatory terms imposed by local BOCs. The government asked the court to order the divestiture of those parts of the local Bell operating companies that provide local exchange services, or, if that relief were denied, divestiture of Western Electric.[4]

After extensive pretrial litigation, including stipulation and discovery proceedings,[5] trial of the case began on January 15, 1981. At the close of the government's case, AT&T moved to dismiss the action on a variety of grounds. The district court denied that motion, finding, inter alia, that the government had presented sufficient evidence to support its allegations (524 F. Supp. 1336 (1981); see J.S. App. 12). AT&T began presenting its evidence on August 3, 1981.

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[3] This complaint also named as a defendant AT&T's research arm, Bell Telephone Laboratories.

[4] Stipulation package 82, ¶¶ 16-30 (lodged June 17, 1981). The complaint originally had prayed for divestiture of both the operating companies and Western Electric.

[5] The pretrial events are summarized in the opinion of the district court at J.S. App. 10-11. In addition, AT&T unsuccessfully sought dismissal of the lawsuit on the grounds that it enjoyed a blanket implied antitrust immunity under the Communications Act. 427 F. Supp. 57 (D.D.C. 1976) (Waddy, J.), motion for leave to file petition for cert. before judgment denied, 429 U.S. 1071 (1977), cert. denied, No. 77-1009 (D.C. Cir. May 27, 1977), cert. denied, 434 U.S. 966 (1977).

3. On January 8, 1982, the government and AT&T announced a proposed modification of the 1956 decree that provided all of the structural and injunctive relief that the government had sought in the 1974 litigation, and thus made further litigation of the 1974 case unnecessary.[6] The proposed modification sought to prevent continuation of the anticompetitive practices alleged in both cases by separating those parts of the Bell operating companies that provide local telephone services, which presently constitute a series of monopoly markets, from the remainder of the AT&T system. This separation would eliminate AT&T's incentive and ability to employ its monopoly power in local exchange services to disable competition in other, potentially competitive markets. Under the terms of the decree, the BOCs would be reorganized to include those assets necessary to provide exchange telecommunications services within areas defined according to the decree's requirements. The BOCs then would be divested (J.S. App. 174), and thereafter would be allowed to provide only: (1) exchange telecommunications service within the defined areas (*id.* at 176, 178); (2) exchange access service on a nondiscriminatory basis to all firms, including AT&T, that provide interexchange (long distance) service between such areas (*id.* at 175-176); and (3) monopoly services actually subject to rate regulation (*id.* at 176). The BOCs thus would be prohibited from providing interexchange telecommunications and information services, and from manufacturing or providing telecommunications and customer premises equipment (*id.* at 176). At the same time, because the new structural re-

[6] The government and AT&T accordingly agreed to dismiss the 1974 case without prejudice to its resumption in the event that the proposed modification was not entered. They submitted a stipulation of dismissal in the 1974 case, which the district court ordered to be lodged, but not filed. At the same time, the government and AT&T agreed to dismiss as moot the government's pending appeal in the Third Circuit from the order in the *Western Electric* case construing the 1956 decree (see note 2, *supra*), and a motion to dismiss was granted.

lief rendered the old restrictions unnecessary, AT&T would be freed of the 1956 decree's patent licensing obligations and the restraints that decree imposed on its sale of services and products. AT&T would thus be free to compete in any market it chose. See generally J.S. App. 12-17.

Because the proposed settlement was in the form of a modification of the 1956 judgment in the *Western Electric* case, it was initially filed in the United States District Court for the District of New Jersey with the request that the entire matter be transferred to the United States District Court for the District of Columbia for proceedings before Judge Greene, who was presiding over the 1974 case. The government and AT&T had agreed, moreover, that procedures identical to those required for consent decrees by the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b) *et seq.* (the "Tunney Act") should be followed, although, in the government's view, the statute technically was inapplicable. The New Jersey district court, however, approved the decree on January 11, 1982, and only thereafter transferred the *Western Electric* case to the United States District Court for the District of Columbia (J.S. App. 18). That court vacated the January 11 approval of the decree and ordered the start of Tunney Act-type procedures (*id.* at 21-22). The United States published in the Federal Register notice of the proposed settlement and a competitive impact statement. 47 Fed. Reg. 7170 (1982). The district court received more than 600 comments on the settlement (see J.S. App. 201-202) and numerous briefs on several issues from more than 100 organizations (see *id.* at 23-25). On June 29 and 30, 1982, it heard oral argument at which 20 counsel from 18 organizations participated (*id.* at 25 & n.65).

On August 11, 1982, the district court issued a lengthy opinion discussing the proposed decree (J.S. App. 1-172). The court found that most of the provisions were in the public interest. It upheld the basic provision for AT&T's divestiture of the BOCs' local exchange monopolies as defined in the proposed decree (*id.* at 48-60). Over the ob-

jections of several states and state regulatory agencies, the court held that, in order to effectuate the decree's goal of eliminating the effects of past anticompetitive conduct in interstate communications, it could order AT&T to take actions, such as reorganizing ownership of assets within the firm, and ultimately separating ownership of assets and common carrier responsibilities, without obtaining prior approval of such actions from state regulatory agencies (*id.* at 36-48). The court also approved releasing AT&T from most of the line-of-business restrictions and patent licensing requirements imposed by the 1956 decree (*id.* at 77-97) and approved the prohibition on BOC manufacture and sale of telecommunications equipment used by telephone companies (*id.* at 97-106). Finally, the court rejected various claims by competitors of AT&T, including a contention that AT&T should be barred from selling customer premises equipment in its "Phone Center" stores (*id.* at 108 & n.248).

The district court stated, however, that it would not approve the decree as in the public interest unless the parties agreed to several substantive and procedural amendments. In particular, the court required that an injunction be entered against AT&T's participation in electronic publishing for at least seven years after the entry of the decree (J.S. App. 86-97), and that the restrictions on BOC marketing of customer premises equipment (*id.* at 106-109) and provision of Yellow Pages (*id.* at 109-112) be removed. The court also required inclusion in the decree of a provision expressly allowing the BOCs to request the court to remove other restrictions "upon a showing that there is no substantial possibility that an Operating Company could use its monopoly power to impede competition in the relevant market" (*id.* at 113-114).[7] The court stated in conclusion that, if these and certain other changes (see *id.* at 170-172) were made, it

[7] The government and AT&T had contended that a BOC's right to seek relief from obsolete restrictions in the future was, in any event, implicit in the decree.

would approve the decree as being in the public interest (*id.* at 172).

The government and AT&T informed the court of their acceptance of the modifications, except that the government asked the court to reconsider its position on the sale of customer premises equipment by the BOCs (J.S. App. 196 & n.1). On August 23, 1982, the court denied this request (*id.* at 195-200). The government and AT&T then agreed to a new decree incorporating the court's proposed changes. On August 24, 1982, the court entered the decree as a modification of the final judgment in the *Western Electric* case (*id.* at 173-190) and accepted filing of the stipulation of dismissal in the 1974 case.

4. On August 26, 1982, the court allowed numerous states, state regulatory agencies, and private parties, many of whom had already filed briefs in the district court (see J.S. App. 158), to intervene for purposes of appealing the final judgment and participating in the proceedings concerning the reorganization plan to be filed (*id.* at 191-194).[8] Several of these intervenors noticed appeals from the judgment (see *id.* at 209-240). The United States and the states of Alabama, Maryland, and Tennessee, supported by most of the other appellants and by AT&T (see *id.* at 204-205 & n.2), asked the district court to certify the appeals for immediate review by this Court pursuant to the Expediting Act, 15 U.S.C. 29(b).

On November 10, 1982, the district court certified the appeals (J.S. App. 204-208), finding that "immediate consideration of the appeals * * * by the Supreme Court is of general public importance in the administration of justice" (*id.* at 207).[9] The court found that the ordinary

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[8] On October 14, 1982, two other parties were permitted to intervene (J.S. App. 203).

[9] Although Alabama and the Tennessee Public Service Commission filed notices of appeal, they apparently never moved to intervene, and the district court did not certify their appeals. The court also declined to certify the appeal filed by Telephonic Equipment

appellate process of court of appeals review, subject to discretionary review in this Court by writ of certiorari, was unlikely to be completed before February 24, 1984, the deadline for divestiture set by the decree. That would lead, the court concluded, to one of two undesirable alternatives: 1) staying the mammoth reorganization pending judicial review, which would perpetuate "extremely unsettled" conditions in the entire telecommunications industry (*id.* at 206); or 2) allowing the reorganization to go ahead as scheduled, thus creating, before the appellate process could run its course, a fait accompli that could not, as a practical matter, be undone (*ibid.*). In this connection, the court also noted that the arrangements being undertaken by AT&T to facilitate the reorganization would inevitably be affected adversely by prolonging the period of uncertainty about the validity of the decree (*ibid.*). Moreover, various states and public utility commissions had indicated that they would seek injunctive relief in other courts, a course that might well have produced conflicting rulings and jeopardized implementation of the decree; the Court found that this also argued for expedited review (*id.* at 207). In addition, the court indicated that some of the issues raised in the appeals were of significant importance to the administration of justice (*id.* at 206).

ARGUMENT

The government agrees with the district court that immediate consideration of these appeals by the Supreme Court is "of general public importance in the administration of justice." Because the earliest possible resolution of these appeals is essential, we urge this Court to accept direct review of them under the Expediting Act, 15 U.S.C. 29(b). We submit, however, that the appeals present no substantial issue warranting plenary consideration by

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Corporation, whose motion to intervene had been denied (J.S. App. 205 n.2, 207 n.9).

this Court. Accordingly, pursuant to Rule 16.1 of the Rules of this Court, the United States moves for summary affirmance.[10]

I. THE COURT SHOULD ACCEPT THE DIRECT APPEALS

A. Prior to 1974, the Expediting Act of 1903, ch. 544, 32 Stat. 823 *et seq.*, provided for direct review by this Court in all government civil antitrust suits. The Act was amended to its present form in 1974 to relieve this Court of that burden. See S. Rep. No. 93-298, 93d Cong., 1st Sess. 6 (1973). In amending the statute, however, Congress recognized that occasionally there would be cases for which the public interest required an avenue of direct appeal to this Court. Accordingly, Congress preserved a right of direct appeal in cases qualifying under 15 U.S.C. 29(b). This case, the government believes, epitomizes the type of case in which Congress found direct appeal to be necessary.

The language and legislative history of the 1974 amendment to the Expediting Act demonstrate a congressional intent that this Court directly review judgments in government antitrust suits when they are of such economic significance that prompt decision by this Court would serve the public interest in enforcement of the antitrust laws.[11] Whether a case warrants direct review under the Act turns on the importance of a

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[10] Under the Expediting Act, if the Court agrees to direct review, the appeal should be "dispose[d] of * * * in the same manner as any other direct appeal authorized by law." Thus, it is entirely appropriate for the Court to affirm summarily as it sometimes does in the case of direct appeals taken from district courts under other statutes. See, e.g., *McClure* v. *Reagan*, 454 U.S. 1025 (1981); *Slate* v. *Noll*, 444 U.S. 1007 (1980). The district court's comprehensive opinion, which fully addresses each of the contentions raised by appellants, provides a sound basis for summary affirmance.

[11] See generally S. Rep. No. 93-298, 93d Cong., 1st Sess. 7-8 (1973); H.R. Rep. No. 93-1463, 93d Cong., 2d Sess. 10-11 (1974); 119 Cong. Rec. 24599 (1973); 120 Cong. Rec. 38585-38587, 39123 (1974).

prompt decision of the case by this Court, not on the difficulty or general significance of the legal issues presented. The Act expressly refers to the importance of "immediate consideration of the appeal" and makes no mention of the significance of the issues raised. Similarly, the focus of the legislative history of the Expediting Act is not on the importance of the issues raised to the development of the law, but rather on the immediate impact of the case itself. As the House Judiciary Committee noted in its report on this provision, "public antitrust cases are unlike other federal cases, * * * they have an impact on the economic welfare of this nation, and * * * consequently they should be treated accordingly." H.R. Rep. No. 93-1463, 93d Cong., 2d Sess. 14 (1974). See also S. Rep. No. 93-298, 93d Cong., 1st Sess. 3-4 (1973); 119 Cong. Rec. 24599 (1973). While Congress, of course, did not regard every government civil antitrust suit as being sufficiently important to merit direct review, it did establish a mechanism by which cases with the most significant impact on the public interest could be appealed directly to this Court.

To assist this Court in determining the importance of a particular case, Congress provided for an initial screening by the district court that decided the case; its determination that a case merits direct Supreme Court review is both a jurisdictional pre-condition to such review and a valuable guide for this Court in making its decision whether to hear the appeal. In this case, the first in the history of the amended Expediting Act in which the United States has sought, or a district court has certified, a direct appeal, the considerations of public policy and sound judicial administration that underlie the Expediting Act strongly indicate that the district court correctly assessed the relevant factors and that this Court should accept the direct appeal.[12]

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[12] The Court should accept direct review of all of the appeals filed. Although the Expediting Act initially states that "an appeal" shall lie to this Court if the district judge certifies that "the ap-

B. 1. The judgment in this case warrants direct review because delay in resolving the validity of the decree will have a broad and significant adverse impact on the telecommunications industry, on related industries including data processing, and thus on the public in general.[13] The telecommunications industry, in itself and together with the increasingly dependent data processing industry, is of major and increasing significance in the American economy.[14] Telecommunications includes not only voice telephone communications but also the transmission of data and of radio and television programming. The participants in the industry include common carriers providing a variety of local and long distance services and the manufacturers and sellers of equipment used to originate, switch, transmit, and terminate telecommunications. Moreover, as the Federal Communications Commission has recognized,[15] the telecom-

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peal" meets the statutory criteria, it is apparent that Congress did not intend to authorize fragmentation of the appellate process. The practice under the original Expediting Act of 1903 was that, if an appeal was filed, the entire case went to the Supreme Court. The amended statute specifies that, if one appeal is certified, "any cross appeal" also shall be docketed in the Supreme Court (15 U.S.C. 29(b)), thus clearly indicating an intent to consolidate all appeals in one court. Moreover, the overriding objective of the Act—expediting final resolution of the case—would be frustrated if separate appeals from the single judgment entered in this case remained to be decided in the court of appeals while other appeals proceeded directly to this Court.

[13] In part because of the magnitude of the financial and other public interest ramifications of the consent decree, there has been a high level of public participation in the proceedings that led to the district court's determination that the decree is in the public interest. See page 6, *supra*.

[14] The Bell System, by far the largest telecommunications firm, had total operating revenues in 1980 of more than $50 billion—almost two percent of the gross national product of the United States (J.S. App. 33 n.85).

[15] See *Computer II*, note 2, *supra*.

munications industry is increasingly intertwined with the economically significant and rapidly growing data processing industry.[16]

AT&T is, of course, the overwhelmingly dominant firm in this industry, both in the provision of local exchange telecommunications and in the economically dependent markets for interexchange services and telecommunications equipment.[17] The decree entered in this case provides an effective structural remedy that, in the government's view, will prevent abuse of AT&T's local exchange bottleneck monopolies, and thus further the public interest in competition. The decree will further aid competition by eliminating restrictions imposed by the 1956 decree on AT&T's entry into data processing and other unregulated markets.

The decree seeks to make the competitive benefits of divestiture available to the public in the shortest possible time that is consistent with orderly procedures. Thus, an essential provision of the decree is a strict timetable for divestiture of the BOCs' local exchange functions. Not later than six months after the effective date of the decree, i.e., by February 24, 1983, AT&T must submit a plan of reorganization. That plan must provide for the completion of the divestiture within 18

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[16] The value of industry shipments for the computer equipment industry in 1981 was more than $30 billion. United States Department of Commerce, *U.S. Industrial Outlook 1982*, at 223. The industry has been, and is expected to continue to be, one of the fastest growing in the United States. *Id.* at xvii, 227. The closely related computer services industry (which includes processing services, professional services, and software products) had revenues of approximately $18 billion in 1981. *Id.* at 226-227.

[17] Since 1960, the Bell Operating Companies have collected 85% of all local service revenues (524 F. Supp. at 1348 n.33). As late as 1981, AT&T's share of interexchange revenue was over 75% (J.S. App. 68). The government contended in this case that, between 1974 and 1977, AT&T's share of the total telecommunications equipment market was approximately 60%.

months after the effective date of the decree, i.e., by February 24, 1984.[18]

A series of complex actions is required to develop and implement the divestiture plan, and these actions have already commenced.[19] The decree requires identification of the areas to be served by the BOCs.[20] It also requires the transfer from AT&T to the BOCs and from the BOCs to AT&T of the facilities, personnel, systems, and other assets corresponding to their respective post-divestiture functions. Finally, once this reorganization of assets has occurred, the BOCs will be separated from AT&T by means of a stock spin-off to AT&T stockholders.

This process of reorganization and divestiture by a company as large and widely held as AT&T requires precise and costly planning. Delay in the planning and implementation of the divestiture schedule, and attendant uncertainty as to when—and, indeed, whether—the actions required by the decree will occur, would be harmful not only to AT&T, its employees, shareholders, and customers,[21] but also to other firms in the telecommuni-

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[18] AT&T has represented to the government and the district court that, in order to facilitate accounting and corporate transactions, it intends to complete the divestiture on or before January 1, 1984.

[19] The reorganization plan, a 471-page document, has been submitted to the district court, which will receive and consider comments from interested persons.

[20] As the district court noted (J.S. App. 205 n.7), AT&T has submitted a proposal dividing the areas in which local service will be provided by the newly independent BOCs (called "exchange areas" or Local Access and Transport Areas ("LATAs")) from the areas to be served by AT&T and other long distance telecommunications companies. Public comments have been received, and the government and AT&T have responded to these comments.

[21] As AT&T has explained in greater detail in its motion to affirm, delay in obtaining a definitive legal ruling on the validity of the decree could necessitate costly revisions in the process that is now underway and hamper the ability of AT&T and the BOCs to secure necessary financing (see J.S. App. 206).

cations and related industries, whose business plans depend on the divestiture schedule. Most importantly, it would be harmful to the public interest in speedily ending restraints on competition and establishing a restructured, competitive telecommunications industry.

2. As the district court found (J.S. App. 207), expedited direct review by this Court also is necessary to minimize the risk that states will obtain state or federal court orders that enjoin actions essential to the decree's implementation or otherwise conflict with the decree. Some states have suggested that, in the absence of a final determination by this Court on the issue of the decree's preemptive effect on state regulatory law (see pages 16-25, *infra*), they would seek such orders (see J.S. App. 207). Because of the multiplicity of courts that could be involved in such actions, it is quite possible that some orders would be entered in such proceedings that would delay uniform nationwide implementation of the divestiture and result in unnecessary expense for all concerned.

Moreover, as is made clear by their own actions, direct appeal is in the interest of the states as well.[22] If the states' appeals were heard first by the court of appeals and rejected, it would be most unlikely that they could obtain review by this Court in advance of the scheduled divestiture date. As we have shown, it would be contrary to the public interest to delay divestiture pending further appellate proceedings, but, as the district court noted (J.S. App. 206), after the divestiture it would "probably be impossible as a practical matter to restore the status quo ante" in the event of an appellate determination in favor of the states. These undesirable alternatives of delaying the divestiture or after-the-fact review both can be avoided by expedited consideration and decision by this Court.

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[22] Most states either sought certification in the district court for direct appeal or supported motions by other parties for such certification. No state opposed certification. See J.S. App. 204-205 & n.2.

3. The issues raised by appellants are particularly suited to expedited direct review by this Court. The preemptive effect of the federal antitrust decree on state regulatory law, contested in the states' appeals, is purely an issue of law. Its resolution will not require the Court to examine an evidentiary record, and therefore prior review by the court of appeals is not necessary to facilitate this Court's review. Similarly, with respect to the private intervenor-appellants' claims that the district court erred in declining to require the modifications they favored, the Court need not review any complex factual record. It need only determine whether the district court applied the correct legal standard and acted within its discretion in concluding that the judgment consented to by the parties was in the public interest.

II. THE COURT SHOULD SUMMARILY AFFIRM THE JUDGMENT OF THE DISTRICT COURT

A. The States' Contention That They Have The Authority To Block Implementation Of The Decree Is Groundless

The states contend (Joint J.S. 9-14; Ill. J.S. 17-21) that, without permission of their regulatory commissions, the district court lacked the authority to order the divestiture the decree requires or to impose restrictions on future service by the BOCs. In effect, the states' position is that a federal court is powerless, without state regulatory permission, to fashion an effective remedy for AT&T's anticompetitive conduct in the interstate telecommunications industry. The district court correctly rejected this argument (J.S. App. 36-48), which fundamentally misconceives the substantive scope of the Sherman Act and the attendant power of a federal court under the Supremacy Clause to remedy actions plainly subject to the Sherman Act's requirements and thus within the court's jurisdiction.

1. The states do not and cannot dispute basic Supremacy Clause principles. Under the Supremacy Clause,

state laws that conflict with a federal statute are, to the extent of the conflict, invalid. See, e.g., *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 158-168 (1978). By the same token, state laws that conflict with a decree that a federal court finds necessary and appropriate to remedy violations of federal law are, to that extent and that extent only, preempted under the Supremacy Clause. And this is so even if there is no contention that the state laws are, apart from the decree, in any way invalid. See *Washington* v. *Fishing Vessel Association*, 443 U.S. 658, 695 (1979); *North Carolina Board of Education* v. *Swann*, 402 U.S. 43 (1971); *Griffin* v. *County School Board*, 377 U.S. 218, 232-234 (1964); *Cooper* v. *Aaron*, 358 U.S. 1 (1958). The federal court properly takes the state's interests, as well as other affected interests, into account in fashioning fair and effective relief. Whether the court has done so, however, goes not to the court's power to preempt conflicting state laws, but only to whether it has exercised the power appropriately in the particular circumstances presented.

These Supremacy Clause principles control here. Section 4 of the Sherman Act, 15 U.S.C. 4, expressly authorizes federal courts to fashion injunctive relief adequate to remedy federal antitrust violations. Acting pursuant to this authority, the district court in this case entered the decree, concluding after due consideration of all affected interests that the decree provided the most effective and appropriate remedy for the barriers to competition that the United States had alleged, and that it did not unnecessarily intrude on the interests of the states. Under general Supremacy Clause principles, the decree therefore preempts, to the limited extent necessary, conflicting state regulatory requirements.[23]

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[23] The federal courts' power to preempt inconsistent state regulatory laws is no less in consent decrees than in litigated decrees. The source of the courts' authority to enter consent decrees, like other injunctive decrees in government antitrust cases, is Section 4 of the Sherman Act, 15 U.S.C. 4. That a court's judgment is based upon the parties' consent does not detract from its character as a

The states argue, however, that because, under *Parker* v. *Brown*, 317 U.S. 341 (1943), and its progeny, the Sherman Act does not extend to "state action," the usual Supremacy Clause principles do not apply, and the federal antitrust remedy must be subject to the subsequent judgment and approval of state regulatory authorities. The states' argument misunderstands both the state action doctrine and the anticompetitive harms that this case was brought to remedy.

The state action doctrine is a precisely defined limitation on the substantive reach of the Sherman Act. It recognizes that Congress did not intend to impose liability under the Sherman Act for state decisions that displace the functioning of the competitive market with active state control and regulation. *Parker* v. *Brown*, *supra*. Nothing, however, in the government's complaint in this case or in the decree entered by the district court in any way conflicts with this principle. The government's complaint did not contend that AT&T's local monopolies, authorized and regulated by the states, were in themselves unlawful. Instead, it contended that AT&T's ownership of the local monopolies allowed it to disable competition in other markets in which it was engaged—markets that were or could be competitive. Moreover, contrary to the states' apparent belief, the decree in no way mandates competition in markets in which the state has the power to maintain a franchised and regulated monopoly. Its structural and injunctive provisions are directed, instead, to allowing unimpeded competition in interstate markets

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judicial act. *United States* v. *Swift & Co.*, 286 U.S. 106, 114-115 (1932). For example, a federal court may enjoin prosecution of a state court action seeking an injunction prohibiting conduct required by an antitrust consent decree. *United States* v. *American Society of Composers, Authors & Publishers*, 442 F.2d 601 (2d Cir. 1971). See also *Brown* v. *Neeb*, 644 F.2d 551, 563 (6th Cir. 1981). Moreover, the district court's independent public interest determination, required under the Tunney Act for original consent decrees and under general equity standards for consented modifications, eliminates any reason for giving less respect to a judicially approved consent decree than to a litigated judgment.

in which competition otherwise is possible, and which the Sherman Act protects.

This Court repeatedly has held that the state action doctrine does not immunize private conduct from Sherman Act liability, even if the conduct has received the affirmative sanction of state legislation or is defended as consistent with state regulatory regimes. See *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980); *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 415 n.45 (1978); *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976); *Parker* v. *Brown, supra*, 317 U.S. at 351. Indeed, with respect to private conduct, the Sherman Act necessarily interferes with the operation of state laws by making unlawful private agreements and arrangements that state law otherwise would approve and enforce. See, e.g., *Schwegmann Brothers* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951). Applying these principles, the federal courts consistently have held that the anticompetitive conduct at issue in this case—monopolization of interstate telecommunications services and equipment markets—is private conduct that is outside the state action exemption and hence fully subject to the Sherman Act.[24] The states do not argue otherwise. They do not claim to possess the power, let alone to have exercised the power, to regulate through their statutes the provision of interstate telecommunications service and equipment that is the subject of this antitrust action. See *Northern Securities Co.* v. *United States*, 193 U.S. 197, 350 (1904).

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[24] *United States* v. *AT&T*, 524 F. Supp. 1336, 1345 (D.D.C. 1981); *United States* v. *AT&T*, 461 F. Supp. 1314, 1320-1330 (D.D.C. 1978). See also *Phonetele, Inc.* v. *AT&T*, 664 F.2d 716 (9th Cir. 1981), petition for cert. pending, No. 81-2359; *Sound, Inc.* v. *AT&T*, 631 F.2d 1324, 1327-1331, 1334-1335 (8th Cir. 1980); *Essential Communications Systems, Inc.* v. *AT&T*, 610 F.2d 1114, 1125 (3d Cir. 1979); *Northeastern Telephone Co.* v. *AT&T*, 477 F. Supp. 251 (D. Conn. 1978), rev'd on other grounds, 651 F.2d 76 (2d Cir. 1981).

The states' argument thus reduces to the assertion that, although they may not immunize and have not immunized the private anticompetitive conduct that is the subject of this antitrust suit, the state action doctrine allows them to block relief necessary and appropriate to eradicate the effects of that private restraint on interstate commerce. The states' claim is unprecedented. No authority they cite, and none that we are aware of, holds that the state action doctrine bars effective antitrust relief against private anticompetitive actions that themselves do not qualify for the state action exemption. Nor does the extension of the state action doctrine for which the states contend have any basis in congressional intent. The markets on which the government's 1974 case primarily focused are subject, under the Communications Act of 1934, to regulation by the Federal Communications Commission, and the competition that the case primarily was brought to protect was competition that the Commission affirmatively had approved and encouraged. See page 22, *infra*. In the Communications Act, with exceptions not applicable here, Congress carefully preserved the applicability of the antitrust laws.[25] In doing

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[25] The Communications Act grants express antitrust immunity only for a limited category of telephone and telegraph company mergers approved by the FCC. See 47 U.S.C. 221 and 47 U.S.C. (& Supp. IV) 222. While strictly limiting this express grant of antitrust immunity, Congress specifically provided in the Communications Act for the application of the Clayton Act to communications carriers and authorized the FCC to enforce against such carriers certain Clayton Act prohibitions on anticompetitive conduct. See 15 U.S.C. 21(a), as amended by Section 602(d), 48 Stat. 1102; *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 456 (1945). This combination of express, limited antitrust immunity and enforcement authority conferred by the statute demonstrates the congressional intent that, in all other respects, the antitrust laws are fully applicable to matters within the FCC's jurisdiction. See *Essential Communications Systems, Inc.* v. *AT&T, supra*, 610 F.2d at 1120. The legislative history of the Communications Act and the regulatory statutes that preceded it confirms that Congress intended the FCC's jurisdiction over communications carriers to operate concurrently with the antitrust laws. *Essential Communications, supra*, 610 F.2d at 1117-1121.

so, it clearly contemplated that, were antitrust violations found, the federal courts would be able to provide effective relief.

The states' argument would altogether defeat this purpose, in effect nullifying the Sherman Act as applied to interstate telecommunications,[26] and weaken the Act generally in any national industry where there is extensive state public utility regulation.[27] As this Court has stressed, a government injunctive action is only as effective as the relief that it obtains, for without relief, "the Government [would have] won a lawsuit and lost a cause." *International Salt Co.* v. *United States*, 332 U.S. 392, 401 (1947); see also *United States* v. *Grinnell Corp.*, 384 U.S. 563, 577 (1966). Yet, were the states' position correct, the state regulators, rather than the federal court, would effectively decide what antitrust remedy is available for antitrust violations by utilities they regulate based on the regulators' assessments of the state's interests alone, and with no obligation to consider at all the benefits of the decree to national markets and interests. The state action doctrine in no way suggests such a complete reversal of Supremacy Clause principles.

2. The question here, therefore, is not, as the states have put it, whether the antitrust court has the power

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[26] Interstate and intrastate telecommunications are carried by one integrated national system. The FCC has found that it is physically impossible to separate most facilities clearly into intrastate and interstate assets because they are used for both types of service. *North Carolina Utilities Commission* v. *FCC*, 537 F.2d 787, 793 (4th Cir.), cert. denied, 429 U.S. 1027 (1976). See also *California* v. *FCC*, 567 F.2d 84 (D.C. Cir. 1977). And while it would be theoretically possible to build separate telecommunications systems, such an effort would be so inefficient that no one has considered it to be economically feasible. In these circumstances, acceptance of the states' position would surely result in a reversal of the primacy of federal authority dictated by the Supremacy Clause and expressed in the Communications Act.

[27] Asset transfers and issuance of stock are commonly regulated by state public utility commissions, and they are essential to implementation of virtually any divestiture decree.

to implement effective relief, but rather whether the district court's exercise of that power in this case is reasonably necessary and appropriate to protect the antitrust interests at stake, in light of the other interests—including state regulatory interests—that the decree might affect. The district court properly applied this standard in reaching its judgment.

There can be no doubt that the government and the district court were correct in concluding that the only effective relief for the competitive harms the government alleged is to divest AT&T of its regulated local monopoly functions. As this Court has said, "[d]ivestiture * * * has traditionally been the remedy for Sherman Act violations whose heart is intercorporate combination and control * * *." *United States* v. *E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 329 (1961).[28] The original 1956 decree failed to provide such structural relief, and so failed, in the government's view, effectively to protect competition. The Federal Communications Commission, to which Congress gave extensive regulatory power over AT&T, also has been incapable of removing the threat to competition presented by AT&T's structure (see J.S. App. 63). Indeed, as noted above, much of the competition that the government's 1974 case sought to free from unlawful restraints is competition made possible by the Commission's procompetitive policies. Accordingly, the FCC has stated that the basic provisions of the decree are in the public interest and will further its objectives. Brief of FCC as Amicus Curiae 6-7, 9-12 (filed Apr. 20, 1982). The decree's antitrust remedies thus represent an effective—indeed, the most effective possible—means of promoting

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[28] Simple divestiture of the BOCs, without the reorganization the decree requires, would not relieve the competitive harms the 1974 case concerned, both because the BOCs own AT&T's in-place customer premises equipment, together with the personnel and equipment used to install and maintain it, and because the BOCs own a significant share of the facilities used to provide AT&T's interstate long distance services.

the Sherman Act's and the Commission's policies governing competition in interstate telecommunications markets.

Moreover, the district court correctly found that the decree did not significantly or unduly interfere with the achievement of legitimate state regulatory interests. As the district court plainly stated (J.S. App. 47), "a judicial remedy may infringe upon state law only to the extent necessary to protect the federal interest." The decree proposed by the United States and entered by the district court manifests the restraint appropriate to federal-state relations. It will in no way limit or expand the present scope of respective federal and state regulatory jurisdictions. To the contrary, it calls only for a one-time transfer of facilities and personnel. After that transfer, the states will continue to have full authority to regulate intrastate telecommunications service, and the FCC will continue to have authority over interstate service.

The states' argument that the decree radically alters state regulatory authority rests on serious misconceptions of the decree's requirements. Contrary to the states' claim (Joint J.S. 11), the decree does not preclude the states from displacing competition in favor of state regulated monopoly service for *intrastate* telecommunications (J.S. App. 176). Moreover, if a state chooses to require monopoly service in a potentially competitive intrastate market (see Joint J.S. 8), it is free under the decree to do so. Indeed, the only ongoing limitation that the decree places on state policy is that a BOC may not provide service other than exchange telecommunications, exchange access, directory advertising, and the marketing of CPE, as well as monopoly services actually subject to rate regulations.[29] In short, the decree in no way interferes with

[29] AT&T has submitted for the district court's approval a proposal delineating the areas of BOC service, or "LATAs." The court has received the comments of the states in order to inform its consideration of this matter (J.S. App. 205-206 n.7). These exchange areas, however, will only determine, for purposes of the decree, the division of assets and service responsibilities between AT&T and the

a state's power, with respect to telecommunications markets within the state's jurisdiction, to substitute its regulation for competition.

Only in one other way can the decree be characterized as even in potential conflict with state regulation. The decree requires a one-time-only transfer of assets between AT&T and the BOCs preparatory to divestiture, in order to separate assets to be used by AT&T in interstate competitive services, which necessarily include some intrastate service facilities, from BOC assets to be used in noncompetitive services (J.S. App. 174). This transfer, although not subject to veto by the states,[30] will not take place until the court approves it, and such approval will come only after the states and other interested parties have had a full opportunity to present their informed views to the district court (*id.* at 185). In any event, the decree in no way curtails the power of the states to regulate local or intrastate rates, including the rates charged intrastate long distance service providers for exchange access. Hence the states retain the ability they now have to subsidize local rates from intrastate long distance service, if they deem such subsidization appropriate to further "universal service" or other state regulatory goals.

In sum, the decree avoids any unnecessary intrusion on legitimate state interests in its effort to provide necessary protection to the vital federal interest in effective competition in the interstate telecommunications markets. As the government explained in its Competitive Impact Statement, the only alternative to the divestiture the decree provides would have been an elaborate injunctive decree of a kind that inevitably would have been difficult to enforce, uncertain in its effectiveness, and necessarily far more intrusive into the states' exercise of their regulatory powers. In terms both of the public interest

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BOCs. They do not determine "local" and "long distance" rate areas for state regulatory purposes. Cf. Joint J.S. 14.

[30] AT&T has indicated that it will make informational filings with state regulatory agencies.

in an effective antitrust remedy and of minimizing effects on state regulatory regimes, "the public is entitled to the surer, cleaner remedy of divestiture." *United States* v. *E.I. du Pont de Nemours & Co.*, *supra*, 366 U.S. at 334. The decree is thus an altogether appropriate exercise of the federal antitrust court's remedial power under Section 4 of the Sherman Act, and under established Supremacy Clause principles it preempts, to the minimal extent necessary, conflicting state regulatory requirements.

B. The Private Parties' Claims That The District Court Should Not Have Approved The Decree Are Insubstantial

Two private intervenor-appellants, Tandy and North American Telephone Association ("NATA"), claim for various reasons that the decree is inadequate. Neither raises an issue worthy of plenary consideration by this Court.

The statutory standard for approval of a consent decree in a government antitrust case is whether it is in the public interest. 15 U.S.C. 16(e).[31] The district court made that finding here, and only if that determination was erroneous may the decree be set aside on appeal.

A consent judgment is the result of a process quite different from litigation in which, after trial, one party wins and one party loses. As this Court has emphasized, "consent decrees are normally compromises in which the parties give up something they might have won in litigation and waive their rights to litigation." *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 235 (1975). In making these compromises, the government must have the discretion to accept a decree that in its view advances

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[31] The same "public interest" standard applied prior to the enactment of the Tunney Act (see *United States* v. *Associated Milk Producers, Inc.*, 394 F. Supp. 29, 44 (W.D. Mo. 1975), aff'd, 534 F.2d 113 (8th Cir.), cert. denied, 429 U.S. 940 (1976); H.R. Rep. No. 93-1463, 93d Cong., 2d Sess. 11 (1974)), and, under general equity principles, also applies to consented modifications.

the public interest, despite the omission of a provision that ideally it would include, if it judges that the likelihood of securing a better decree is outweighed by the risks inherent in further litigation. Cf. *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129, 154-155, 158 (1967) (Stewart, J., dissenting). This does not mean, of course, that a district court must automatically accept the government's concept of the public interest. But it does mean that, if the delicate settlement process is to function effectively, the court, in making its public interest determination, must always focus on the decree as a whole, and it must consider objections to any particular provision—especially when those objections come from private intervenors—only as they bear on the overall merit of the decree. For the same reasons, once the trial court decides that the decree as a whole is in the public interest, the correct standard of appellate review of challenges to the exclusion or inclusion of particular provisions is whether the district court's judgment as to the public interest impact of the consent decree as a whole represents a reasonable exercise of its remedial discretion.[32]

Neither Tandy nor NATA has come close to showing that the district court erred in concluding that the decree as a whole is in the public interest. Indeed, they have not even tried. They do not dispute the district court's judgment that the central element of the decree, the divestiture of the BOCs, is an essential and immensely

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[32] The same considerations apply to a provision included by the parties after the district court's rejection of an initial settlement proposal. That rejection does not prevent or control the submission of a new decree. See *Consent Decree Bills: Hearings on H.R. 9203, H.R. 9947 and S. 782 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 43 (1973) (Senator Tunney); *In re International Business Machines Corp.*, 687 F.2d 591, 602 (2d Cir. 1982). The government, in agreeing to a revised settlement with AT&T after the district court had indicated that it would not approve the decree as proposed, did so on the basis of its judgment that the entry of the revised proposal, despite its drawbacks, would better serve the public interest than would continued litigation.

important step toward creating competitive markets for interexchange telecommunications services, telecommunications equipment sales, and CPE sales. Nor do they quarrel with the proposition that freeing AT&T from the marketing strictures of the 1956 decree enables that company to bring new competition to numerous other markets. Significantly, they do not contend that the decree as a whole disserves the public and should be rejected.

1. Tandy argues (J.S. 10-18) that the decree could be made even better and should be amended by this Court to require AT&T to divest its "Phone Center" stores to the BOCs and to grant patent licenses. But where, as in this case, the district court's approval of the overall decree was sound, it is not within the purview of an appellate court to redesign the government's bargain by adding or deleting provisions at the behest of disappointed third parties.[33]

Moreover, implementation of Tandy's proposals would be contrary to the public interest. As the district court found (J.S. App. 73-75), "there is no competitive basis" (*id.* at 75) for forcing AT&T to give up its "Phone Center" stores. The divestiture of the BOCs will remove AT&T's ability to engage in anticompetitive conduct in the equipment market, and the presence of AT&T, once divested of the BOCs, can be expected to enhance competition (*id.* at 67-71, 73-75).

Tandy's objection to the absence of mandatory licensing of AT&T's patents (J.S. 13-15) is equally unsound. Henceforth, AT&T will have to fund research and devel-

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[33] Tandy cites various cases (J.S. 11-12) for the proposition that this Court, on direct review of civil antitrust judgments, assesses the merits of particular provisions. All these cases involved litigated judgments where the judge's exercise of discretion in fashioning the various individual elements of relief was at issue. As noted above, the role of the appellate court is quite different in the case of a consent judgment where the district court's function is the more limited one of assuring that the agreement reached by the parties is, when viewed as a whole in light of the compromise nature of such agreements, consistent with the public interest.

opment from revenues earned in competitive markets, and it would be anticompetitive to burden it with patent licensing requirements that would dull its investment incentives. Moreover, as the district court correctly concluded (J.S. App. 77-79), even absent the mandatory licensing requirement, AT&T can be expected to license extensively because of existing contractual obligations and market incentives. Indeed, the thrust of Tandy's objection is not that the district court was wrong, but rather that it had an insufficient record on which to appraise the patent licensing issue and should be required to hold an evidentiary hearing (see J.S. 13-15). But consent decrees, unlike litigated decrees, do not require evidentiary hearings or, indeed, the taking of evidence at all. See 15 U.S.C. 16(e).[34]

2. While Tandy objects that the decree will not enable the BOCs to be strong competitors in the sale of customer premises equipment, NATA's objection to the decree is virtually the opposite. It expresses concern that the BOCs will dominate the customer premises equipment markets because the decree permits the BOCs to sell such equipment. It claims that the BOCs will be able to exploit their local service monopolies to disadvantage competitors in the sale of CPE (see NATA J.S. 3-10). But, like Tandy, NATA does not claim that the decree as a whole is contrary to the public interest. Rather, it seeks review of the district court's refusal to accept the decree's original proposal to exclude the BOCs from the sale of customer premises equipment.

While the government agrees with NATA's substantive position on the sale of equipment by BOCs,[35] the court's

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[34] Tandy's claim is factually as well as legally unsound because the consent decree at issue here came after virtually a full trial in the 1974 case in which the district court was able to obtain an extensive knowledge of the telecommunications and related industries. See J.S. App. 12.

[35] The decree originally proposed would have banned the BOCs from selling customer premises equipment in order to prevent them

failure to accept the original proposal in this regard, even if erroneous, affords no legal basis for interfering with the decree subsequently entered. Contrary to NATA's contention (J.S. 8), the district court did not find the original proposal to be in the public interest. Rather, the court, though finding much good in the original proposal, concluded that the proposed restriction on BOC provision of customer premises equipment and several other provisions rendered the decree not in the public interest unless modified (J.S. App. 165-172). At this point, it was up to the government to decide whether to appeal the district court's refusal to enter the decree originally proposed by the parties. See *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 86-90

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from repeating AT&T's alleged anticompetitive practice of leveraging power in regulated monopoly markets to stifle competition in the unregulated equipment market. This restriction was consistent with the basic theory of the case and the decree, and with other prohibitions on BOCs, such as confining them to monopoly services and barring them from manufacturing equipment or selling telephone company equipment (J.S. App. 97-106). The district court recognized this consistency, but nonetheless thought that removing the ban on the sale of CPE would enhance competition by allowing the BOCs to compete against AT&T in the CPE market (J.S. App. 106-109). We believe that, in reaching this conclusion, the district court underrated the danger that the BOCs will disadvantage their competitors in interconnecting customer equipment. The court also ignored the fact that, if the BOCs are allowed to sell CPE, they will have the incentive to discrimnate against competitors in the installation and maintenance of equipment they sell and that such discrimination will impair competition at the manufacturing level as well. This is particularly so with respect to complex equipment where, for technical reasons, a BOC would be expected to market the products of only a few manufacturers. In sum, we believe that the public interest would have been served better by the initial decree than by the decree subsequently agreed to by the parties and approved by the court. But, as indicated above, we believe that the latter decree also—on the whole—serves the public interest, and this is the standard by which the decree, as finally agreed to by the parties and entered by the court, must be judged.

(1981).[36] The government decided, however, that the benefits to the public interest of immediate entry of a decree that met the court's criteria and provided far-ranging competitive relief to a previously restrained industry counselled strongly against incurring the uncertainties and delay that would be caused by either appealing the decision or continuing the trial of the case. It therefore decided to execute a new consent decree with AT&T. It is the overall merit of that decree entered by the court, rather than past rulings on superseded bargains, that is at issue. Since NATA does not even claim that the present decree is contrary to the public interest, there is no reason to set aside the bargain of the parties because an intervenor believes that an even better decree could be fashioned, and, indeed, once had been proposed.

CONCLUSION

The Court should accept the direct appeals and affirm the judgment of the district court.

Respectfully submitted.

REX E. LEE
Solicitor General

WILLIAM F. BAXTER
Assistant Attorney General

RONALD G. CARR
Deputy Assistant Attorney General

BARRY GROSSMAN
ROBERT B. NICHOLSON
NANCY C. GARRISON
ROBERT J. WIGGERS
Attorneys

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[36] The question whether an intervenor could have appealed from the court's refusal to enter that decree is not presented here, since the only appeals before this Court are from the court's order approving the modified proposed decree.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-952

STATE OF MARYLAND, ET AL.,

APPELLANTS,

v.

UNITED STATES OF AMERICA, ET AL.

No. 82-953

TANDY CORPORATION,

APPELLANT,

v.

UNITED STATES OF AMERICA, ET AL.

No. 82-992

NORTH AMERICAN TELEPHONE ASSOCIATION,

APPELLANT,

v.

UNITED STATES OF AMERICA, ET AL.

No. 82-1001

STATE OF ILLINOIS,

APPELLANT,

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOTION TO EXPEDITE CONSIDERATION

The Solicitor General, on behalf of the United States, moves to expedite consideration of the jurisdictional statements in this case. In the event the Court notes probable jurisdiction, the Solicitor General further moves to expedite the argument in this case so that it may be submitted for decision within the present Term of the Court.

The jurisdictional statements filed in the above-captioned appeals seek direct review by this Court, pursuant to the Expediting Act, 15 U.S.C. 29(b), of a consent judgment in a civil antitrust case brought by the United States. The judgment, which requires substantial reorganization of the American Telephone & Telegraph Company (AT&T), will provide effective relief for the competitive harms alleged by the government, and it has been found by the district court to be in the public interest.

The United States is today filing a motion to affirm. For the reasons set forth in that motion, the United States agrees with appellants and the district court that immediate consideration of the appeals by this Court is of general public importance in the administration of justice and that this Court should, therefore, accept the direct appeals. Moreover, it is important that these appeals be resolved as early as possible, and delay in their resolution beyond the present Term of Court would have a broad and significant adverse impact on the telecommunications industry and on the public in general.

Accordingly, the United States suggests that the jurisdictional statements and motions to affirm be considered by the Court at its next scheduled conference. If the Court concludes to note probable jurisdiction and set the case for argument, we submit that the Court should require that briefs on the merits be submitted within the time provided by Rule 35 of the Rules of this Court, without extension, and should calendar the case for argument and submission within the present Term of Court.

Respectfully submitted.

REX E. LEE
Solicitor General

DECEMBER 1982

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Nos. 82-952, 82-992, 82-953 & 82-1001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF MARYLAND, *et al.*, PEOPLE OF THE STATE OF ILLINOIS, TANDY CORPORATION, and NORTH AMERICAN TELEPHONE ASSOCIATION,

Appellants,

vs.

UNITED STATES OF AMERICA and WESTERN ELECTRIC COMPANY and AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Appellees.

On Appeal From The United States District Court For The District of Columbia

MOTION TO AFFIRM

HOWARD J. TRIENENS*
ALFRED A. GREEN
JIM G. KILPATRIC
195 Broadway
New York, New York 10007
(212) 393-5111

GEORGE L. SAUNDERS, JR.
JOHN D. ZEGLIS
DAVID W. CARPENTER
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

Attorneys for Appellees Western Electric Company and American Telephone And Telegraph Company

*Counsel of Record

QUESTIONS RESTATED

The Modification of Final Judgment ("MFJ") in this case grants the United States the structural relief it has sought in over thirty years of antitrust litigation with the Bell System. Under the MFJ, the Bell System is engaged in a massive reorganization in which it will divest its local exchange functions as of January 1, 1984. The questions presented in these appeals are:

1. Whether direct Supreme Court review of the challenges to the MFJ and the prompt elimination of the uncertainty that threatens a vital national industry is "of general public importance in the administration of justice" within the meaning of the Antitrust Expediting Act?

2. Whether States may, consistent with the Supremacy Clause, nullify the MFJ and prevent its implementation by interposing regulatory statutes that have already been held *not* to immunize the Bell System from antitrust remedies?

3. Whether the District Court abused its discretion in entering a judgment, by consent of the parties, that substantially achieves the Justice Department's antitrust objectives?

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S. 622, 96th Cong., 1st Sess. (1979)	9
S. 2827, 96th Cong., 2d Sess. (1980)	9
S. 898, 97th Cong., 1st Sess. (1981)	9

Nos. 82-952, 82-992, 82-953 & 82-1001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF MARYLAND, *et al.*, PEOPLE OF THE STATE OF ILLINOIS, TANDY CORPORATION, and NORTH AMERICAN TELEPHONE ASSOCIATION,

Appellants,

vs.

UNITED STATES OF AMERICA and WESTERN ELECTRIC COMPANY and AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Appellees.

On Appeal From The United States District Court For The District of Columbia

MOTION TO AFFIRM

On August 24, 1982, the District Court, with the consent of the parties, entered the Modification of Final Judgment ("MFJ") in this case. This judgment orders a structural reorganization of American Telephone and Telegraph Company ("AT&T")[1] and its subsidiaries ("the Bell System") that achieves the Justice Department's antitrust objectives in its over three decades of litigation with the Bell System. However, the existence of legal challenges to the MFJ, no matter how insubstantial, profoundly affects the Bell System's ability to implement this judgment and to provide telephone service for the nation while proceeding with this massive reorganization. The resulting uncertainty has foreclosed the Bell System from the debt markets in which it has traditionally raised essential capital, left its more than one million

[1]Appellee Western Electric Company is a wholly-owned subsidiary of AT&T. AT&T has no parent company. In addition to its wholly-owned subsidiaries, AT&T has ownership interests in the Southern New England Telephone Company, Cincinnati Bell, Incorporated, and the Cuban American Telephone and Telegraph Company. This statement is made pursuant to Rule 28.1.

employees unsure of where they will be working, and inhibited, impeded, and complicated investment, regulatory, and operational decisions both by the Bell System and the telecommunications industry as a whole.

The only way to put a timely end to this potentially crippling uncertainty is for these appeals to be decided by this Court this term, pursuant to the Antitrust Expediting Act. Moreover, the appeals are each so insubstantial that they all may be summarily affirmed, without burdening this Court's docket. AT&T therefore moves for summary affirmance of each of the appeals.

STATEMENT OF THE CASE

Throughout this century, the Bell System has provided integrated, end-to-end telephone service. The Bell System's wholly-owned Bell Operating Companies ("BOCs") have franchised monopolies that provide local exchange telecommunications service for approximately eighty percent of the nation's telephone subscribers under state public utility regulation. The BOCs' local exchange facilities also originate and terminate both *intra*state long distance ("intercity") calls regulated by the States and *inter*state intercity calls regulated by the Federal Communications Commission ("FCC") under the Communications Act of 1934, 47 U.S.C. §151 *et seq.* The BOCs also own interexchange facilities that provide intercity transmissions for both intrastate and interstate calls, whereas AT&T's Long Lines Department owns portions of the network used exclusively for interstate transmissions.

The Bell System is technologically integrated. Through Western Electric Co., it manufactures equipment for use by Bell System Companies in providing telecommunications service. Through Bell Telephone Laboratories, the Bell System conducts basic research and development. The BOCs have each executed License Contracts with AT&T that require them to make payments to AT&T to fund research, development, and central support for their activities.

In the past thirty-five years, the Justice Department has twice, in 1949 and 1974, filed civil actions under the Sherman Act that sought major structural reorganizations of the Bell System. In each case, the Justice Department alleged that the structure of the Bell System provides it with both the incentive and the ability to leverage its power in the regulated monopoly markets to foreclose or impair competition in related competitive markets.

This Action And The 1956 Judgment. This action was commenced in 1949 in the United States District Court for the District of New Jersey. Because state and federal regulatory authorities then required certificated telephone carriers to maintain end-to-end responsibility for telecommunications service, the only area of Bell System operations in which competition was feasible was equipment manufacturing. The Department's complaint alleged that the Bell System had monopolized this market and sought (Prayer, paras. 10-18) both the divestiture of Western Electric and the compulsory, nondiscriminatory licensing of all Bell System patents for reasonable royalties.

In January, 1956, the parties stipulated to the entry of a Final Judgment that did not require the divestiture of any major part of the Bell System. However, in allowing the Bell System to preserve its integrated character, the Final Judgment essentially limited the Bell System to providing regulated communications services and manufacturing the equipment used for such services[2] and compelled the licensing of all Bell System patents on reasonable terms. On January 24, 1956, the District Court entered the Final Judgment upon its presentation by counsel for the parties.

[2]Sections II(i) and V of the Final Judgment limited AT&T and the BOCs to, with some exceptions, the provision of "communications services . . . the charges for which are subject to public regulation under the Communications Act of 1934 [or state laws]." Section IV of the Final Judgment limited Western Electric to manufacturing equipment of a type used by AT&T and the BOCs in providing communications services subject to public regulation.

Events Between 1956 and 1974. In the ensuing two decades, technological developments and changes in regulatory policies introduced competition into major new areas of telecommunications.

In a series of decisions in the late 1960s and 1970s, the FCC authorized telephone subscribers both to attach customer provided equipment to telephone company terminals and, more importantly, to substitute their own equipment for the carrier provided equipment that is located on a customer's premises and that provides access to the telephone network ("customer premises equipment" or "CPE").[3] States opposed these FCC decisions, claiming that the competitive provision of CPE would drive the prices of the equipment down to cost and thereby jeopardize the States' abilities to establish above-cost rates that could subsidize basic services and promote their traditional universal service objectives.[4] The States further argued that because they regulated intrastate telephone service, they had plenary authority under the Communications Act of 1934 (47 U.S.C. §§152(b)(1), 221(b)) to prevent the use of customer provided CPE for any intrastate telecommunications service, notwithstanding that CPE was also used in common for interstate service.

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[3]*Carterfone*, 13 F.C.C.2d 420, *reconsid. denied*, 14 F.C.C.2d 571 (1968); *AT&T "Foreign Attachment" Tariff Revisions*, 15 F.C.C.2d 605 (1968), *reconsid. denied*, 18 F.C.C.2d 871 (1969); *Interstate and Foreign MTS and WATS, First Report and Order*, 56 F.C.C.2d 593 (1975); *Telerent Leasing Co.*, 45 F.C.C.2d 204 (1974), *aff'd sub nom. North Carolina Utilities Comm'n* v. *FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976); *Interstate and Foreign MTS and WATS, Second Report and Order*, 58 F.C.C.2d 736 (1976), *aff'd sub nom. North Carolina Utilities Comm'n* v. *FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977); *Interstate and Foreign MTS and WATS, Third Report and Order*, 67 F.C.C.2d 1255 (1978).

[4]See, *e.g.*, *North Carolina Utilities Comm'n* v. *FCC*, 552 F.2d 1036, 1048 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977); see generally *United States* v. *AT&T*, No. 74-1698 (D.D.C.), Stipulation Package No. 7 (paras. 10-18, 52-56) (hereinafter referred to as "Stipulation Package No. ").

The Bell System supported the states' claims, but they were rejected. The FCC was held to have paramount regulatory authority over facilities jointly used for intrastate and interstate communications. The states' plenary regulatory authority, in contrast, was held to be limited to those facilities "separable from and . . . not substantially affect[ing] the conduct or development of interstate communications." *North Carolina Utilities Comm'n* v. *FCC*, 537 F.2d 787, 793 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976); *accord, North Carolina Utilities Comm'n* v. *FCC*, 552 F.2d 1036, 1045-46 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977). These decisions gave rise to an intensely competitive industry ("interconnect industry") in which hundreds of firms such as IT&T, Rolm, Exxon, Northern Telecom, Tandy, and others began furnishing CPE and other equipment to telephone subscribers for interconnection to the telephone network. See Stipulation Package No. 42B.

Another series of decisions under the Communications Act introduced competition into the provision of intercity services. These decisions authorized specialized common carriers to provide specified intercity services[5] and required franchised local exchange carriers to provide the new entrants with interconnections to their local distribution networks and to originate and terminate intercity calls for them. These decisions were opposed by the Bell System and by some States as well.[6] Each contended that, by allowing specialized common carriers selectively to serve high density routes, the decisions would disrupt the nationwide averaged rate structure, weaken the ability of interstate services to

[5] *Allocation of Frequencies in the Bands Above 890 mc*, 27 F.C.C. 359 (1959), *reconsid. denied*, 29 F.C.C. 825 (1960); *Microwave Communications, Inc.*, 18 F.C.C.2d 953 (1969), *reconsid. denied*, 21 F.C.C.2d 190 (1970); *Establishment of Domestic Communications—Satellite Facilities by Non-Governmental Entities*, 22 F.C.C.2d 86 (1970); *Specialized Common Carrier Services*, 29 F.C.C.2d 870 (1971), *aff'd sub nom. Washington Utilities & Transportation Comm'n* v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975).

[6] See, *e.g.*, *Washington Utilities & Transportation Comm'n v. FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975).

support local rates through the jurisdictional cost separations processes, and thereby jeopardize the ability of regulatory commissions to set rates to achieve universal service goals. Nonetheless, by the late 1970s and early 1980s, the authority of these competing carriers had been expanded to the point that they could participate in the transmission of any interstate call, either through their own facilities or through resale of the services of Bell System companies.[7]

Finally, technological developments during the twenty-five years after entry of the 1956 Judgment substantially eliminated the earlier distinctions between regulated telecommunications service and unregulated data processing. These developments created actual and potential competition between telecommunications carriers and data processing vendors in the provision of CPE, enhancements of basic telecommunication services, and information services.[8]

[7]See *Bell System Tariff Offerings of Local Distribution Facilities For Use By Other Common Carriers*, 46 F.C.C.2d 413 (1974), *aff'd sub nom. Bell Tel. Co. of Pennsylvania* v. *FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975); *American Tel. & Tel. Co., Restrictions on Interconnection of Private Line Services*, 60 F.C.C.2d 939 (1976); *MCI Telecommunications Corp., Investigation into the Lawfulness of Tariff F.C.C. No. 1 Insofar as it Purports to Offer Execunet Service*, 60 F.C.C.2d 25 (1976), *rev'd, MCI Telecommunications Corp.* v. *FCC*, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978); *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 60 F.C.C.2d 261 (1976), *amended on reconsid.*, 62 F.C.C.2d 588 (1977), *aff'd sub nom. AT&T* v. *FCC*, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978); *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services*, 83 F.C.C.2d 167 (1980), *reconsid. denied*, 86 F.C.C.2d 820 (1981).

[8]See, *e.g.*, *First Computer Inquiry*, 28 F.C.C.2d 267 (1971), *aff'd in part and rev'd in part sub nom. GTE Service Corp.* v. *FCC*, 474 F.2d 724 (2d Cir. 1973); *American Telephone & Telegraph Co. (Data Speed 40/4)*, 62 F.C.C.2d 21 (1977), *aff'd sub nom. IBM* v. *FCC*, 570 F.2d 452 (2d Cir. 1978); *Second Computer Inquiry*, 77 F.C.C.2d 384 (1980), *aff'd sub nom. Computer & Communications Industry Ass'n* v. *FCC*, No. 80-1471 (and consolidated cases) (D.C. Cir. November 12, 1982).

Despite the technological developments that characterized this period generally, local exchange functions have largely retained their natural monopoly characteristics. Providers of CPE, intercity services, and information services continue to require access to local exchange facilities to compete in these markets.

1974 Case. In 1974, the United States brought a second civil antitrust action under the Sherman Act against the Bell System, *United States* v. *AT&T, et al.*, No. 74-1698 (D.D.C.). The Government alleged that intervening events demonstrated that the 1956 Judgment did not prevent the Bell System from monopolizing telecommunications equipment markets and that the Bell System had further, through control of its franchised local exchange monopolies, unreasonably restrained competition in the intercity service and CPE markets in which the FCC had introduced competition. The Department again sought the structural separation of the Bell System's monopoly activities from its other businesses, praying for the divestiture of the BOCs and the divestiture and dissolution of Western Electric. Complaint, Prayer, paras. 3-5. The Justice Department thereafter modified its prayer for relief to seek divestiture only of those parts of the Bell System that provide local exchange functions.[9]

AT&T moved to dismiss this suit on the ground that, although it has no blanket antitrust immunity, the specific conduct at issue was subject to pervasive federal regulation—and complementary state regulation—and thus was impliedly immune from the Sherman Act.[10] The District Court twice denied this motion, holding that neither federal nor state regulation immunized AT&T from this suit for structural relief, and the Court of Appeals and this

[9]Stipulation Package 82; see *Plaintiff's First Statement of Contentions and Proof*, pp. 526-27 (November 1, 1978).

[10]AT&T also sought to dismiss claims in the case on the grounds that the 1956 Judgment was *res judicata*, but these claims were also rejected by the District Court. *United States* v. *AT&T*, 1976-2 Trade Cas. ¶61,097 (D.D.C. 1976).

Court denied AT&T's petitions to have this ruling reviewed. *United States* v. *AT&T*, 461 F.Supp. 1314, 1320-21 (D.D.C. 1978); *United States* v. *AT&T*, 427 F.Supp. 57 (D.D.C. 1976), *cert. denied*, 429 U.S. 1071 (1977), *cert. denied*, No. 77-1009 (D.C. Cir. May 27, 1977), *cert. denied*, 434 U.S. 966 (1977).

After the Bell System's threshold defenses were rejected, the District Court established innovative procedures to expedite its pretrial proceedings and trial. *United States* v. *AT&T*, *supra*, 461 F.Supp. at 1343-49. These procedures enabled the completion of discovery, the narrowing of the issues, and the commencement and substantial completion of the trial within the next three and a half years.

Trial of the case commenced in March, 1981. In each of the three major areas of the case—CPE, intercity services, and telecommunications equipment—the Government's proof consisted of evidence, vigorously disputed by AT&T, that the Bell System had intentionally abused its control over its franchised local exchange monopolies to discriminate against competitors and to cross subsidize its prices in competitive markets. At the close of the Government's case, the District Court held that there had been sufficient evidence to put AT&T to its proof and denied AT&T's motion to dismiss. *United States* v. *AT&T*, 524 F.Supp. 1336 (D.D.C. 1981); Tr. 14909-10.

Throughout the period of the 1974 case, the FCC and Congress extensively debated a number of issues raised by the 1974 case and the 1956 Judgment. Both forums considered the adoption of regulatory or legislative devices to prevent or reduce the possibility that AT&T would abuse its local franchise monopoly to obtain advantages in related competitive markets.[11] A focal point of the

[11]See, *e.g.*, FCC CC Docket No. 78-72 (exchange access); *Second Computer Inquiry*, 77 F.C.C.2d 384 (1980); FCC CC Docket No. 80-742 (License Contracts); FCC CC Docket No. 80-53 and No. 19129 (Phase II) (Bell System Procurement Practices); H.R. 12323, 94th

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debate was whether and to what extent the 1956 Judgment would and should foreclose AT&T from participating in markets in which computer technologies had merged with the technologies that provide telecommunications services and in which traditional rate of return regulation had ceased to be appropriate.[12] The FCC's decision in one proceeding that raised this issue—the *Second Computer Inquiry*—led AT&T and the United States on March 4, 1981, to begin to litigate the question of the proper interpretation and scope of the 1956 Judgment.[13]

AT&T had vigorously contended, in all of these forums, that it had not abused its control of its local exchange monopolies and that the public interest would best be served by maintaining the end-to-end integration of the Bell System. Nevertheless, it had

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Cong., 2d Sess. (1976); H.R. 13015, 95th Cong., 2d Sess. (1978); H.R. 3333, 96th Cong., 1st Sess. (1979); S. 611, 96th Cong., 1st Sess. (1979); S. 622, 96th Cong., 1st Sess. (1979); H.R. 6121, 96th Cong., 1st Sess. (1979); S. 2827, 96th Cong., 2d Sess. (1980); S. 898, 97th Cong., 1st Sess. (1981); H.R. 5158, 97th Cong., 1st Sess. (1981).

[12]See, *e.g.*, H.R. 6121, 96th Cong., 2d Sess. §218 (1980); S. 898, 97th Cong., 1st Sess. §229 (1981).

[13]In the *Second Computer Inquiry*, *supra*, 77 F.C.C.2d 384 (1980), the FCC established a new nontariff form of regulation for the Bell System's CPE and its enhancements of basic telecommunications service. Because the Justice Department had taken the position that the 1956 Judgment would bar AT&T from continuing to provide these services once this new regulatory scheme was implemented, AT&T moved for construction of the Final Judgment on March 4, 1981. The Memorandum in Support of The Motion For Construction further stated (p. 17) that the 1956 Judgment had become "obsolete and unjustifiable" and that the only "long term resolution" of the problems it raised was to vacate it or modify it to reflect the changed environment. In an order issued on September 23, 1981, the District Court held that, as written, the 1956 Judgment allowed the continued provision of CPE and enhanced services, despite the change in the form of public regulation. The United States' appeal from this order was subsequently dismissed on the ground that the proposed modification of the Final Judgment had eliminated any controversy between the parties. *United States* v. *Western Electric Co.*, No. 81-1960 (3d Cir. February 2, 1982). See also J.A. 82 n.198.

become increasingly apparent that continuing the Bell System's present ownership of local exchange monopolies along with competitive operations would be a source of increasing controversy and uncertainty. Even if it won *United States* v. *AT&T*, the Bell System's common control over franchised local monopolies and competitive businesses would unavoidably expose it to future antitrust challenges and to onerous legislative and regulatory restrictions. And if the 1956 Judgment were held to foreclose Bell System participation in computer and other markets that had merged with traditional telecommunications, the Bell System's ability to continue to innovate and enhance its services would have been severely impaired.

The Modification Of Final Judgment. Against this background, AT&T concluded that the best way to end the uncertainty and to obtain freedom from the constraints of the 1956 Judgment and from continuing antitrust exposure was to agree to the precise structural reorganization that the Justice Department was seeking in the 1974 case: the divestiture and complete separation of the Bell System's local exchange functions from its intercity, CPE, and manufacturing businesses. Thus, on January 8, 1982, AT&T and the United States stipulated to the entry of a modification of the 1956 Judgment that would achieve the Justice Department's objectives.[14]

The proposed modification required that, within eighteen months of its entry, the Bell System be split between its local exchange functions and other functions, through a number of discrete steps. Exchange boundaries (or "local access and transport areas" ("LATAs")) must be drawn to determine which facilities are intraexchange facilities to be divested and which are interex-

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[14]Simultaneously with the filing of this stipulation, the parties voluntarily dismissed the 1974 Case pursuant to Fed. R. Civ. P. 41(a)(1)(ii).

change facilities that AT&T will retain.[15] See §IV(G); J.A. 178-79. AT&T must then transfer to the BOCs—or to a BOC-owned central staff organization—resources to enable them to provide local exchange functions independently of AT&T after divestiture. §I(A)(1); J.A. 174. The BOCs' facilities and resources relating to local exchange functions must then be separated by transferring the CPE and interexchange facilities to newly created entities. §I(A)(2); J.A. 174. And the License Contracts and other contracts that integrate the BOCs with the rest of the Bell System must be terminated. §I(A)(3); J.A. 174. Finally, the local exchange carriers ("divested BOCs") must be spun off. §I(A)(4); J.A. 174-75.[16] Because this structural reorganization eliminates the whole basis for the 1956 Judgment, the proposed modification vacates the injunctive provisions of that judgment in their entirety. J.A. 173.

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[15]Specifically, LATA boundaries determine which traffic is interexchange traffic and which is intraexchange traffic. LATAs thus allow the preponderant use of facilities to be measured for the purpose of making ownership determinations at divestiture. See also §VIII(G); J.A. 184. The sole significance of LATAs after divestiture is that they define the areas in which the divested entities provide local exchange functions and define prohibited interexchange services. See §§II(A), (B) & (D); J.A. 175-76.

[16]A series of corporate transactions will be required to reconfigure the BOCs as local exchange companies and to spin them off from AT&T. To separate exchange and non-exchange assets, the Bell System plans that each BOC will create two wholly-owned subsidiaries, one to which the BOCs' interexchange facilities will be transferred and another to which the BOCs' customer premises equipment (CPE) will be transferred. The BOCs will then distribute the stock of these subsidiaries to AT&T which, as a result, will hold its ownership of the BOCs' exchange facilities separately from its ownership of the BOCs' interexchange and CPE assets. AT&T will then create seven new subsidiaries and transfer to these companies the stock of the BOCs that provide exchange service in each of seven regions of the country as well as one-seventh ownership interests in the central staff organization. AT&T will then spin off the regional companies by distributing its stockholdings in those companies to existing AT&T stockholders. See *Plan of Reorganization* (filed in District Court December 16, 1982), pp. 440-71.

The proposed modification also imposes restrictions on the divested BOCs. It requires that they provide exchange access to all interexchange carriers that is equal in type and quality to that provided AT&T and prohibits discrimination in favor of AT&T and its affiliates in procuring equipment. §§II(A), (B), Appendix B; J.A. 175-76, 187-90. To assure that the BOCs may not themselves obtain competitive advantages through abuse of control of their local exchange facilities, the proposed modification prohibited the BOCs from providing interexchange services, information services, CPE, and any services other than exchange and exchange access service or natural monopoly services actually regulated by tariff. §II(D); J.A. 176.

No services will be discontinued as a result of the MFJ. All the facilities and personnel providing telephone service before divestiture will continue to provide telephone service after divestiture. The difference will be that new AT&T affiliates will retain the Bell System's CPE and interexchange facilities and functions in each State while the separately owned BOCs will provide local exchange service.

Public Interest Proceedings. After the modification was proposed, this case was transferred to the United States District Court for the District of Columbia. The District Court recognized that any significant delays in the decision to enter the proposed modification would threaten a vital national industry. J.A. 148-49, 205-06; see also April 8, 1982 Order, pp. 5-6. At the same time, because of the proposed modification's enormous significance, the District Court, with the parties' consent, ordered procedures—which it conducted with great expedition—that gave the general public rights of participation that went beyond those prescribed by the Antitrust Procedures and Penalties Act of 1974, 15 U.S.C. §§16(b)-(h) ("Tunney Act"). After over 600 individual comments on the proposed modification were received, the District Court ordered additional briefing on eight broad sets of issues, conducted a two day nonevidentiary hearing on June 29

and June 30, 1982, and afforded all commentors an opportunity to indicate, through explicit offers of proof, whether a further evidentiary hearing would be necessary to resolve any issues related to its public interest determination. See May 25, 1982 Memorandum, p. 4.

Many commentors challenged the effectiveness or appropriateness of specific provisions of the proposed modification. All the States and state commissions, directly or through their national association, filed comments that also challenged the proposed modification's effectiveness on far more fundamental grounds. Each noted that splitting the Bell System pursuant to the MFJ would require a number of one-time transactions that, under the literal terms of the applicable state statutes, could not occur without explicit prior state regulatory approval. Each argued that the States, which generally opposed the split, had "unassailable authority to veto" the divestiture and to cause a "balkanized scheme of telephone service."[17] Because these claims went to the question whether the Decree could be effective, all conceded that this issue should be resolved as part of the District Court's public interest determination. See J.A. 37 n.100.

On August 11, 1982, the District Court issued a 178-page opinion concluding that the basic split of the Bell System was an entirely appropriate antitrust remedy and obviously in the public interest. J.A. 58, 66. The Court's opinion rejected nearly all the challenges to specific provisions of the proposed modification. J.A. 73, 75, 77, 79, 101-04, 106, 124. The Court rejected the States' claims that they could block or undo the implementation of the Decree, holding that prior approval requirements were effectively preempted, but *only* to the limited extent they might be invoked to block the one-shot transactions. J.A. 47-48. The Dis-

[17]Joint Comments of Alabama, 23 other states, *et al.* p. 12; Arizona Comments, pp. 7, 10, 13-15; see also Michigan P.S.C. Comments, p. 6; Alabama P.S.C. Comments, pp. 4-5; Maryland P.S.C. Comments, pp. 7-11; District of Columbia Comments, p. 12; National Association of Regulatory Utility Commissions ("NARUC") Comments, pp. 30-42. In all, some sixty-six state and state utility commissions as well as NARUC filed such comments.

trict Court did conclude that several changes would have to be made in the proposed modification before it would be approved, including a provision that the divested BOCs be permitted to provide, but not manufacture, CPE. J.A. 104-109. The District Court stated that it would promptly approve a modification that adopted its proposed revisions. J.A. 172.

On August 19, 1982, the Department of Justice filed a memorandum (pp. 1-2) stating that it was prepared to agree to all the District Court's proposed revisions because "the alternatives available would pose unacceptable costs to the public interest." However, the Department urged the District Court to reconsider its position on CPE in one respect. In the Department's view, the divested BOCs could be allowed to market "simple CPE" immediately. In contrast, it stated that their provision of "complex CPE" could pose greater competitive dangers and that a decision on BOC entry into these markets should be postponed until a hearing could explore the competitive costs and benefits of BOC participation. *Id.*, pp. 2-3. On August 23, 1982, the District Court rejected the Department's proposal. J.A. 196-200. On August 24, 1982, the parties stipulated to the entry of the Modification of Final Judgment that contained all the District Court's proposed revisions, and it was entered later that same day. Although the MFJ gives the Bell System until February 24, 1984, to implement the reorganization, financial considerations dictate that it must be completed by January 1, 1984. Tr. 25130, 25456-57.

On August 26, 1982, the District Court authorized approximately 110 public and private entities and organizations to intervene in this case for purposes that include appeal of the entry of the Modification Of Final Judgment. J.A. 192-94; see J.A. 201-203. Eighteen appeals were filed, one of which (Jack Faucett Associates, Inc.'s) has been dismissed. On November 10, 1982, the District Court, pursuant to the Expediting Act (15 U.S.C. §29(b)), issued an order directing that the appeals be taken directly to this Court. J.A. 204-208.

REASONS FOR SUMMARY AFFIRMANCE

This case epitomizes the Government antitrust actions in which Congress intended to retain direct Supreme Court review of a District Court's final judgment. To subject this case to the delays of the ordinary appellate processes would threaten a critical national industry. The questions presented in the appeals, moreover, are purely legal issues that can be readily decided by this Court. Indeed, each of the four appeals is so appropriate for disposition by this Court and the issues which they raise are so insubstantial that the judgment below should be summarily affirmed.

I. Expedition Of These Appeals Under The Expediting Act Is A Matter Of Paramount Public Importance.

In the Antitrust Expediting Act, 32 Stat. 823, *as amended*, 15 U.S.C. §29(b), Congress found that public antitrust cases can have an enormous "impact on the economic welfare of this nation," that they "are unlike other cases," and that it is often necessary and appropriate to expedite the final decision in such cases by making final judgments directly appealable to this Court. H. R. Rep. No. 93-1463, 93d Cong., 2d Sess. 14 (1974); see S. Rep. No. 93-298, 93d Cong., 1st Sess. 3-4 (1973); *United States* v. *California Co-operative Canneries*, 279 U.S. 553, 558 (1929). In the 1974 amendments to the Act, Congress eliminated the previous requirement that there be direct Supreme Court review in all Government antitrust cases, see 15 U.S.C. §29(a), finding that the requirement imposed an undue burden on this Court, particularly in cases requiring review of voluminous records.[18] However, Congress retained direct appeals for those

[18]See S. Rep. No. 93-298, *supra*, p. 8 (1973); Hearings Before The Subcommittee On Antitrust and Monopoly Of The Judiciary Committee On S. 782 and S. 1088, pp. 16, 113 (1973); Hearings Before Subcommittee On Monopolies and Commercial Law On H.R. 9203, H.R. 9947 and S. 782, pp. 36, 183 (1973); S. Rep. No. 91-1214, 91st Cong.,

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Government antitrust cases in which "the district judge who adjudicated the case enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice." 15 U.S.C. §29(b). In such cases, the Act provides that this Court may then either "dispose of the appeal . . . in the same manner as any other direct appeal" or remand it to the appropriate court of appeals, where it will be subject to the ordinary appellate procedures. *Id.*

The Expediting Act, however, was not intended to "bestow on the Supreme Court an unqualified discretion to hear or not hear a case." H.R. Rep. No. 93-1463, *supra*, pp. 13-14 (1974). On the contrary, Congress "intended that the Supreme Court hear cases that are of general public importance in the administration of the antitrust laws." *Id.* The standard for direct appeals is *not* that the case raises novel or unsettled legal issues or is otherwise immediately review-worthy. *Compare* 28 U.S.C. §1254(1) (Supreme Court review prior to judgment in the Court of Appeals).[19] To the contrary, Congress intended to expedite cases that have "serious

(Footnote continued from preceding page)

2d Sess. 2 (1970); H.R. Rep. No. 91-1129, 91st Cong., 2d Sess. 3-6 (1970) (reprinting letter from Attorney General of the United States). In making these findings, Congress relied on the earlier statements of members of this Court. See *United States* v. *Singer Manufacturing Co.*, 374 U.S. 174, 175 n.1 (1963); *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 364-65 (1962) (Harlan, J., concurring). But see *United States* v. *Singer Manufacturing Co.*, 374 U.S. at 197 (White, J., concurring).

[19]The legislative history of the 1974 Amendments sharply distinguishes between the standards under 28 U.S.C. §1254(1) and those under the Expediting Act:

> "The Committee was well aware that under current law—Section 1254 of title 28, U.S. Code, which is not affected by this legislation—either party may by-pass the court of appeals and seek direct review by the Supreme Court. The Committee does not intend to duplicate or displace that through its amendment. Section 1254 does bestow on the Supreme Court an unqualified discretion to hear or not hear a case. The Committee amendment does not. It is intended that the Supreme Court hear cases on direct review that are of general public importance in the administration of the antitrust laws." H.R. Rep. No. 93-1463, *supra*, pp. 13-14 (1974).

legal and economic consequences going beyond the mere private interests of the individual litigants" as well as those that are independently review-worthy.[20]

The appeals from the entry of the MFJ present precisely the kind of case that Congress intended to preserve for direct Supreme Court review—regardless of the merits or legal significance of the questions presented. As the District Court repeatedly found (*e.g.*, J.A. 33, 148-49, 153, 205-06), the implementation of the MFJ implicates a most fundamental national interest. The Bell System provides services critical to the national economy and the national defense, and it must continue to provide vital service while it engages in a massive undertaking to comply with the MFJ before January 1, 1984. Any significant delays in the final judicial resolution of whether, when, or how the Bell System is to be restructured would create uncertainty that would threaten the Bell System network and severely jeopardize its ability to serve the public during this critical period. It would mean that the Bell System would continue to be all but foreclosed from the debt markets from which it traditionally has raised most of the outside capital necessary to maintain and improve the network,[21] that operational and regulatory decisions would be severely inhibited and impeded, and that the Bell System's more than one million employees would be unsure of where they will be employed. As the District Court found, significant delays in the final resolution of this case will "disrupt AT&T's own operations," "inhibit investment and other business decisions necessary

[20]Hearings Before Subcommittee On Antitrust and Monopoly On S. 782 and S. 1088, pp. 32, 41 (March 15, 1973) (quoting S. Rep. No. 91-1214, 91st Cong., 2d Sess. 4 (1970) and H. R. Rep. No. 91-1129, 91st Cong., 2d Sess., 6 (1970), reprinting the position of the Attorney General of the United States).

[21]Since the MFJ was proposed on January 8, 1982, the Bell System has not issued any BOC bonds, its traditional method of raising much of the outside capital needed to finance the approximately $18-$20 billion required each year for expansion and modernization. Tr. 25130, 25456-57.

to the maintenance and improvement of the telecommunications network," "jeopardize the ability of the Bell System's components to raise the outside capital needed for the modernization and expansion of [the] network," and "adversely affect the entire telecommunications industry and thus, indirectly, the nation as a whole." J.A. 148-149; see also April 8, 1982 Order, pp. 5-6.

Expedition of the appeals under the Expediting Act will end this uncertainty and the accompanying risks to the public at the earliest possible time. In contrast, to remit the appeals to the ordinary procedure of initial review in the Court of Appeals, petitions for certiorari, and possibly further review in this Court could extend an intolerable "state of limbo" (*id.*, p. 6) beyond the date that the Bell System is required to complete the divestiture. See J.A. 205-06. A failure to expedite could hold the most severe adverse consequences for the public. Nor would retaining jurisdiction over these appeals create a precedent that would burden the docket of this Court. This case of unprecedented economic importance to the public is the first time that the Justice Department has sought expedition of an appeal in the eight years since Congress amended the Antitrust Expediting Act.

II. The Appeals Have No Substance And Should Be Summarily Affirmed.

The appeals that have been filed from the entry of this antitrust judgment call for immediate consideration by this Court. Unless there is a claim of fraud, mistake or lack of jurisdiction, "a decree . . . rendered by consent is always affirmed, *without considering the merits of the cause.*" *Swift & Co.* v. *United States*, 276 U.S. 311, 323-24 (1928) (Sherman Act consent judgment) (emphasis added; citations omitted); *accord, NLRB* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318, 323 (1961). A District Court's approval of a settlement in a case affecting the public is otherwise reviewable, if at all, only to determine whether the court abused its discretion in agreeing with the parties that the settlement was reasonable and

in the public interest.[22] In the Tunney Act—whose procedures were adopted by the District Court—Congress did not intend to change the standard of review of consent decrees.[23]

Two different types of appeals have been filed from the entry of the MFJ. First, Illinois, Maryland and thirteen other States have challenged the jurisdiction of the District Court to enter any Decree—whether litigated or by consent—that unconditionally orders structural relief requiring asset transfers and other transactions that would otherwise require state approval under regulatory statutes.[24] Second, Tandy and the North American Telephone Association ("NATA") challenge the MFJ on the ground that isolated provisions of the MFJ do not order relief that, in the views of these parties, would be desirable. Both sets of appeals are wholly insubstantial and should be summarily affirmed.

[22]See, *e.g.*, *Patterson* v. *Newspaper & Mail Deliverers' Union*, 514 F.2d 767, 771-72 (2d Cir. 1975) (settlement of employment discrimination suit); *Metropolitan Housing Development Corp.* v. *Village of Arlington Heights*, 616 F.2d 1006, 1015 (7th Cir. 1980) (Fair Housing Act); *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 846-50 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) (Title VII); *Grunin* v. *International House of Pancakes*, 513 F.2d 114, 123 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975) (settlement of antitrust class action); *Young* v. *Katz*, 447 F.2d 431, 432-33 (5th Cir. 1971) (settlement of class action stockholder suit). See also *United States* v. *Bechtel Corp.*, 648 F.2d 660, 663 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981) (government antitrust consent decree). The only circumstance in which a court has employed *de novo* review is where the District Court *refuses* to enter the proposed consent decree. See *United States* v. *City of Alexandria*, 614 F.2d 1358 (5th Cir. 1980).

[23]The Tunney Act procedures were enacted to assure that the District Court would be fully informed before deciding whether to enter a proposed decree, *not* to alter the pre-existing case law as to when consent decrees may properly be entered. H. R. Rep. No. 93-1463, *supra*, pp. 11-12 (1974); S. Rep. No. 93-298, *supra*, pp. 3-6 (1973). See *United States* v. *National Broadcasting Co.*, 449 F.Supp. 1127, 1141-42 (C.D. Cal. 1978); *United States* v. *Associated Milk Producers, Inc.*, 394 F.Supp. 29, 44-45 (W.D. Mo. 1975), *aff'd*, 534 F.2d 113 (8th Cir.), *cert. denied sub nom. National Farmers' Organization, Inc.* v. *United States*, 429 U.S. 940 (1976).

[24]The majority of the States that raised this issue in the court below and their national association (see p. 13 n. 17, *supra*) did not join in these appeals.

A. The States' Claim That They May "Veto" The Implementation Of The MFJ Is Contrary To The Sherman Act and The Supremacy Clause.

The basis for the States' challenge to the District Court's jurisdiction to enter the MFJ is that each State has statutes that provide for public regulation of intrastate telephone service and that require, among other things, prior state regulatory approval before a regulated firm may convey or transfer any facilities used to provide intrastate service. As the States recognize, the MFJ orders the BOCs to transfer CPE and interexchange facilities used to provide intrastate service and to engage in similar one-shot transactions that would otherwise require prior approval of state agencies. The States further assert, erroneously, that the MFJ will conflict with their ongoing regulation of intrastate telephone service after the divestiture is concluded. The States' claim is that a Sherman Act judgment cannot order conduct inconsistent with state law and that the MFJ must therefore be set aside.

The States' claims are extreme, startling, and wholly without merit. If they were valid, no decree could be entered under the Sherman Act—whether litigated or by consent[25]—that unconditionally ordered the restructuring of a regulated utility.[26] A Sherman Act decree would only be advisory and could, at most, order the parties to use their "best efforts" to obtain necessary state

[25]Litigated decrees and consent decrees are both "judicial acts", *United States* v. *Swift & Co.*, 286 U.S. 106, 115 (1932); *Pope* v. *United States*, 323 U.S. 1, 12 (1944), and neither may be entered unless found to be appropriate antitrust remedies and within the public interest. Litigated decrees and consent decrees are accorded equal preemptive effects. *United States* v. *Swift & Co.*, *supra*, 286 U.S. at 114-15; *Delaware Valley Citizens' Council For Clean Air* v. *Pennsylvania*, 674 F.2d 976, 980-81 (3d Cir.), *cert. denied*, 51 U.S.L.W. 3287 (October 12, 1982); *United States* v. *ASCAP*, 442 F.2d 601 (2d Cir. 1971); J.A. 38-39 n. 102.

[26]The effect on the States would have been identical if the 1974 case had been litigated to judgment and the Government had obtained the relief it sought, or even if a judgment had been entered by default.

regulatory approval. Whether and to what extent a decree could be implemented would be committed to future regulatory proceedings in 51 different jurisdictions, each of which could block or condition the Decree's implementation and produce, in the States' own words, "balkanization."

This Court has repeatedly held that the Supremacy Clause of the Federal Constitution forecloses any claim that the existence of state laws or state regulation can limit the power of federal tribunals to effectuate federal law. For example, where federal administrators have adopted regulations to carry out federal laws, the Supremacy Clause forbids the States from interposing local laws—even when they are valid for all other purposes—to prevent or impede the regulation from being immediately effective. See *Fidelity Federal Savings & Loans Ass'n* v. *de la Cuesta*, U.S. , 50 U.S.L.W. 4916 (June 28, 1982); *California Public Utilities Comm'n* v. *United States*, 355 U.S. 534 (1958) (preempting prior approval statute). Similarly, in fashioning remedies to effectuate federal law, federal courts have the authority to order conduct that is inconsistent with local laws, and no claim can be made that state law operates as a limitation on the federal court's jurisdiction:

> "State-law prohibition against compliance with the District Court's decree cannot survive the command of the Supremacy Clause of the United States Constitution . . . [t]he federal court unquestionably has the power to enter the various orders that state official and private parties have chosen to ignore, and even to displace local enforcement of those orders if necessary to remedy the violations of federal law found by the court." *Washington* v. *Fishing Vessel Association*, 443 U.S. 658, 695-96 (1979).

See also *Cooper* v. *Aaron*, 358 U.S. 1, 18-19 (1958); *North Carolina* v. *Swann*, 402 U.S. 43, 45 (1969).

The States here insist that different principles apply under the Sherman Act because of the existence of pervasive public utility

regulation. The short answer to this claim is that no State challenges the earlier holdings that state regulation of the Bell System is not so extensive or comprehensive that it immunizes the conduct at issue in the 1949 and 1974 cases from antitrust remedies. Nor could any such claim be made. The MFJ is designed to create more competitive conditions in interstate markets in which the FCC introduced competition and which are outside the states' plenary regulatory authority.

Because Congress did not intend that state regulation would be a substitute for Sherman Act controls over AT&T in these cases,[27] Congress could not have intended that the States have "unassailable authority" to block or condition the implementation of relief. Once it is determined that state regulation does not immunize a defendant from antitrust controls, the federal court must have the power to enter a decree that effectuates antitrust policy, even if it requires conduct that conflicts with state statutes that are valid for all other purposes. Otherwise, federal antitrust jurisdiction would be effectively transferred to 51 different regulatory commissions and antitrust enforcement against interstate businesses would be "balkanized," contrary to the obvious intent of Congress.[28] As Judge Greene correctly stated in rejecting the states' argument, the "practical consequences of such a rule to antitrust enforcement could be devastating." J.A. 45.

[27]Although AT&T does not claim a blanket immunity from the antitrust laws, it does contend that some of its specific conduct was so integrally related to pervasive federal regulation that it should not be subjected to a trial under the different standards of the antitrust laws with respect to *that conduct*. See *Phonetele, Inc.* v. *AT&T*, 664 F.2d 716 (9th Cir. 1981), *petition for certiorari pending*, No. 81-2359.

[28]Because the interstate telecommunications network is a single interactive network, the Commerce Clause of the Federal Constitution would prevent the States from unreasonably blocking transactions and "balkanizing" its effective operations even if there were no Sherman Act. See, *e.g.*, *Edgar* v. *Mite*, U.S. , 50 U.S.L.W. 4767 (June 23, 1982); *FERC* v. *Mississippi*, U.S. , 50 U.S.L.W. 4566 (June 1, 1982). Where, as here, the transactions are required to implement a federal statute, the lack of state authority follows *a fortiori*.

The States' argument that *Parker* v. *Brown*, 317 U.S. 341 (1943), dictates a different result in this case is meritless. It proceeds from a fundamental misconception of both the state action exemption and the MFJ. *Parker* v. *Brown* and its progeny, to be sure, establish that the Sherman Act was not intended to prevent States from "supplanting competition with regulation" (Md J.S. p. 11), or to "[destroy] the States' power to engage in economic regulation," *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 133 (1978). Thus, an "actively supervised" and "clearly articulated" state regulatory scheme may not be invalidated merely because there is a conflict between the statute and the central policy of the Sherman Act. *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

But contrary to the State's suggestions, the MFJ does *not* invalidate any state statute. It is directed to private parties, not state officials. And it interferes with state regulation in only one limited respect; it unconditionally orders a one-shot realignment of assets within the present Bell System (from the BOCs to new AT&T affiliates). Although the MFJ effectively preempts state prior approval and related requirements *insofar as* they could block, impede, or undo the divestiture ordered by the MFJ, these statutes will remain valid for all other purposes.

The States' assertions that the MFJ will interfere with their ongoing regulation of intrastate telephone service is erroneous. First, Maryland's Brief is simply wrong in stating (p. 14) that LATA boundaries will be periodically reconfigured after the divestiture and that there will be ongoing transfers. The only purposes of the LATA boundaries are to govern the *one-time* split of the Bell System and to define the areas in which the divested BOCs are to provide exchange and exchange access services. These boundaries do not affect the states in their regulatory determination as to whether a telephone call is charged for as a flat rate call

or toll call—as the earlier public interest proceedings made explicit.[29]

Second, the reorganization neither removes any facilities from service nor requires the competitive provision of any service. What it does is realign the resources of the Bell System so that AT&T will retain control of CPE and interLATA facilities now on the books of the BOCs. The States will be able to exercise all their existing regulatory authority over the entities that result from the reorganization. They may regulate rates for intrastate service to the full extent of their statutory authority and, in connection therewith, may value the assets used to provide this service and apply their prior approval requirements to transactions relating to intrastate service. Contrary to Illinois' claim (J.S. 20-21), they may similarly regulate all aspects of the relationship between independent telephone companies and the newly created Bell entities. A state commission may order the BOCs to interconnect with the independents for the joint provision of intraLATA toll service, order AT&T to interconnect with independents to provide joint interLATA service, and regulate the division of charges between them. See, *e.g.*, Ill. Rev. Stat., Ch. 111⅔, pars. 8, 29. Despite Maryland's contrary argument (p. 14), States will continue to be free to treat intrastate toll service as a regulated monopoly and to pursue whatever regulatory policies they choose—as the District Court explicitly recognized (J.A. 46-47, n.117).[30] There, accordingly, is no basis for any claim that the MFJ supplants ongoing state regulation.

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[29]See, *e.g.*, Justice Department's Competitive Impact Statement, pp. 45-49; AT&T Reply Comments, pp. 21-24.

[30]The reason that the BOCs' interexchange facilities are being transferred to AT&T is to create more competitive conditions in the provision of *inter*state intercity services for which the facilities are also used, *not* to supplant any state policy relating to intrastate service.

B. Tandy's and NATA's Challenges To The MFJ's Treatment Of CPE and Patent Licensing Are Frivolous.

In contrast to the States' broad challenge to the District Court's jurisdiction, NATA and Tandy have appealed from the entry of the MFJ on the narrow grounds that its provisions relating to CPE and patent licensing do not, in their views, sufficiently promote competition. Quite apart from the fact that Tandy and NATA are competitors with their own antitrust remedies and no apparent litigable interests in this case, their appeals are frivolous. Their claims misconceive the nature of consent judgments and the role of appellate courts in reviewing them.

A judgment entered by consent is normally a compromise. "[I]n exchange for the saving of cost and the elimination of risk the parties each give up something they might have won had they proceeded with the litigation." *United States* v. *Armour & Co.*, 402 U.S. 673, 681 (1971); *accord, Carson* v. *American Brands, Inc.*, 450 U.S. 79, 86-88 (1981). In the Tunney Act, Congress intended to encourage the continued use of consent decrees. Contrary to Tandy's claim (J.S. 12, 18), the fact that isolated provisions of a consent decree may not afford all the antitrust relief that "conceivably" could have been ordered after trial can never be grounds for disapproving a decree, for that is the very essence of a consent judgment. *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 850-51, 863 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). The appropriateness of a decree depends on whether it, when considered as a whole, is a reasonable compromise and consistent with the overall public interest. See, *e.g., United States* v. *Gillette Co.*, 406 F.Supp. 713, 716 (D. Mass 1975) (Aldrich, J.).

Tandy's arguments are based on the premise (see Tandy J.S. 12, 15, 18) that a court reviewing the entry of a consent judgment

may pick and choose among its provisions and selectively rewrite them. This premise is false. Because the provisions of the decrees are interrelated and represent a single bargain, appellate courts are "powerless to rewrite the provisions of a settlement agreement" lest they change a provision that was essential to one party's assent. *Patterson* v. *Newspaper & Mail Deliverers' Union*, 514 F.2d 767, 772 (2d Cir. 1975) (Mansfield, J.); *accord*, *United States* v. *Allegheny-Ludlum Industries, Inc.*, *supra*, 517 F.2d at 850-51.[31]

Against this background, the claims that the District Court acted improperly in approving the MFJ are spurious. Even when analyzed in isolation, the CPE and patent licensing provisions promote antitrust objectives and, in any event, are reasonable compromises between conflicting positions. And when they are considered, as they must be, in the context of the MFJ as a whole —which orders the precise structural relief that the Justice Department sought in three decades of litigation—no claim can be made that the District Court abused its discretion in approving the MFJ.

1. The CPE Provisions Of The MFJ Do Not Vitiate The Decree.

Although Tandy and NATA are both participants in the CPE market, they challenge the CPE provisions of the MFJ on grounds which are at odds with one another. NATA contends that the MFJ should have prohibited the divested BOCs from providing CPE at all. Tandy, in contrast, supports the decision to allow the BOCs to provide CPE, but it objects to the fact that they will be divested without any retail outlets. The fact that two

[31] *Accord*, *United States* v. *General Electric Co.*, 1977-2 Trade Cas. ¶61,659 at 72,717 (E.D.Pa. 1977); *United States* v. *Associated Milk Producers, Inc.*, 394 F.Supp. 29, 42 (W.D.Mo. 1975), *aff'd*, 534 F.2d 113 (8th Cir.), *cert. denied*, 429 U.S. 940 (1976); see generally *United States* v. *Ward Baking Co.*, 376 U.S. 327 (1964).

market participants take these inconsistent positions should, by itself, demonstrate that the MFJ's treatment of the issue is not outside the zone of reasonableness.

The entire basis for NATA's claim is that the modification proposed by the parties on January 8, 1982, prohibited the BOCs from offering any CPE. NATA appears to contend that the District Court should have deferred to the initial position of the Justice Department and approved the modification in the form in which it was originally proposed. However, the question whether the January 8, 1982, proposal was properly rejected is not before the Court; neither the parties nor NATA have sought appellate review of that decision. NATA's argument that courts should give great weight to the Justice Department's views supports the conclusion that the MFJ was properly entered. The Department consented to the MFJ that was entered on August 24, 1982, on the basis that it was in the public interest.

More fundamentally, it is frivolous of NATA to suggest that the treatment of CPE creates such great potential for competitive abuse that the MFJ must be vacated in its entirety. The MFJ significantly reduces any threats to competition resulting from BOC participation in these markets. By prohibiting BOC manufacturing of CPE and ordering the transfer of the BOCs' CPE and CPE-related resources to AT&T, the MFJ ends the integration of the BOCs' existing customer premises equipment businesses with their exchange services and assures that any BOC that reenters the market after divestiture will not have an embedded CPE business to support discriminatory conduct or cross-subsidization. See J.A. 104-09, 196-200.

Tandy's position that the BOCs should be divested with their phone stores would have made the MFJ even less consistent with the Department's antitrust objectives; franchised local exchange monopolies would have retained aspects of an embedded CPE business. Moreover, because the BOCs will be divested without any CPE and because some divested BOCs may choose not to

enter this business, it would have been inconsistent to assign the stores to the BOCs. Nor will the division of assets have any adverse effect on the competitiveness of the CPE market. Indeed, each divested BOC that chooses to enter this business in the future will have customer contacts that will enable it rapidly to establish a market presence, as the District Court found. J.A. 108 n. 248. Therefore, there is nothing in the CPE provisions of the MFJ that is unreasonable, much less that would vitiate the MFJ.

2. The Termination Of Mandatory Patent Licensing Was Entirely Appropriate.

Tandy's argument that the District Court should not have approved termination of the 1956 Judgment's requirement of compulsory patent licensing without first conducting an evidentiary hearing is also frivolous. Much of the attractiveness of consent judgments is that they avoid the expense, delay, and uncertainty of litigation. For this reason, the Tunney Act makes it explicit that a District Court should resort to trial-type hearings "only where it is imperative . . . for the purpose of eliciting additional facts," S. Rep. No. 93-298, *supra*, pp. 6-7; H. R. Rep. No. 93-1463, *supra*, p. 8, and that the District Court has broad discretion in selecting the procedures to make its public interest determination. 15 U.S.C. §16(e), (f). This discretion was not abused.

First, Tandy is in no position even to object to the failure to hold a hearing. It failed to comply with the District Court's request in its May 25, 1982, Memorandum that any person who proposes an evidentiary hearing make an explicit showing as to the necessity of a hearing, its duration, and the number and types of witnesses and other participants.[32] In any event, the issues

[32]Specifically, the District Court's Memorandum of May 25, 1982, stated (p. 4) that any person who believed an evidentiary hearing to be necessary "shall state why the issue cannot be resolved without such a hearing, the precise purpose of the proposed proceeding, its estimated duration, the number and type of witnesses and exhibits to be adduced, and the identities of others who would be expected to participate in the hearing." Tandy did not even purport to attempt to comply with this order.

Tandy now identifies as appropriate for hearing (J.S. p. 14) are so vague and diffuse that they would have defied judicial resolution within any reasonable period of time.

Second, the termination of the patent licensing provisions was entirely reasonable. Indeed, as the Justice Department argued below, "retaining the requirements in the context of the divestiture mandated by the modification would, itself, be anticompetitive." Br. of United States In Response to District Court's May 25, 1982 Mem., p. 50. The patent licensing requirement was previously imposed—without any adjudication of liability or any opportunities for public comment—*in exchange* for preserving the integrated Bell System. Its premise was that patents funded in whole or in part by revenues from franchised monopolies should be made available to all. See Justice Department's Competitive Impact Statement, pp. 44-45. Because the MFJ orders the divestiture of franchised monopolies and ends the License Contracts, the premise for the 1956 Judgment's provision vanishes. To impose an unconditional requirement on the post-divestiture AT&T to license all its patents when its competitors are under no such obligation would disserve, not promote, the purposes of the antitrust laws. J.A. 78-79 and n.191.

CONCLUSION

The District Court has shown that a trial court can expeditiously manage big antitrust cases and assure that the uncertainty that they create does not imperil vital national industries. The expedition of this appeal under the procedures Congress has established will enable the judicial system to continue to protect these public interests.

For the reasons stated, the appeals from the entry of the MFJ should be decided by this Court. Each is so lacking in merit that they all should be affirmed summarily. This will remove the uncertainty that threatens the national telecommunications network and clouds the Bell System's operations while it proceeds with the largest corporate reorganization in our nation's history.

Respectfully submitted,

HOWARD J. TRIENENS*
ALFRED A. GREEN
JIM G. KILPATRIC
195 Broadway
New York, New York 10007
(212) 393-5111

GEORGE L. SAUNDERS, JR.
JOHN D. ZEGLIS
DAVID W. CARPENTER
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

Attorneys for Appellees
Western Electric Company
and American Telephone
And Telegraph Company

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*Counsel of Record

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Nos. 82-952, 82-992, 82-953 & 82-1001

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

STATE OF MARYLAND, et al., PEOPLE OF THE STATE OF ILLINOIS, TANDY CORPORATION, and NORTH AMERICAN TELEPHONE ASSOCIATION,

Appellants,

vs.

UNITED STATES OF AMERICA and WESTERN ELECTRIC COMPANY and AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Appellees.

On Appeal From The United States District Court For The District of Columbia

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AT&T'S MOTION TO EXPEDITE THESE APPEALS

Appellees Western Electric Company and American Telephone and Telegraph Company ("AT&T"), by their attorneys, hereby move to expedite the consideration and decision of these appeals. First, AT&T seeks expedition of the decision on its motion for summary affirmance of each of the appeals. Second, in the event that any or all of the appeals are to be orally argued, AT&T moves that the argument occur this Term.

1. On August 24, 1982, the District Court, with the consent of the parties, entered a Modification of Final Judgment ("MFJ") in this case that achieves the Justice Department's antitrust objectives in over three decades of litigation with the Bell System. It orders AT&T to divest its local exchange functions, which will represent about $100 billion of its approximately $150 billion in assets.

The MFJ will--as is explained more fully in the Plan of Reorganization filed with the District Court on December 16, 1982--be implemented by dividing the present Bell System into nine separately owned entities (AT&T, seven regional companies, and the region-owned Central Staff Organization) and will require a separation of assets and personnel of each of the major components of the Bell System: AT&T, the 22 Bell Operating Companies ("BOCs"), Western Electric Company, and Bell Telephone Laboratories.

Implementation of the MFJ is an enormous and unprecedented undertaking. It must be accomplished while the Bell System continues to provide--throughout the period of this massive reorganization--telecommunications services that are vital to the national economy and the national defense. For these reasons, the division must be performed with care and precision. And as more fully explained below, although the MFJ would allow the split to be completed on February 24, 1984, it must be accomplished even more quickly, by January 1, 1984. This is "because a more prolonged period of uncertainty and transition would impair the financing and efficient management of this enterprise upon which the Nation depends for telephone service." Affidavit of Charles L. Brown, Chairman of the Board of AT&T, p. 2 (filed in the District Court on December 16, 1982).

Even apart from ordering a structural reorganization, the MFJ requires extensive interim planning. To comply with the Decree's equal access requirements (see Appendix B; J.A. 187-90), the Bell Operating Companies will have to reconfigure their exchange networks under the schedule prescribed in Appendix B of the MFJ (id.) and, in any event, file and obtain regulatory approval of exchange access tariffs before January 1, 1984. See id; §II(A); J.A. 175.

2. Four sets of appeals have been filed from the District Court's decision to enter the MFJ. Two of these appeals challenge the District Court's authority to order a reorganization without first obtaining the approval of regulatory commissions in each of the States in which the Bell System operates (Nos. 82-952, 82-992). The other two challenge the MFJ's treatment of equipment on customer premises and patent licensing (Nos. 82-953, 82-1001).

3. The existence of these legal challenges to the MFJ, no matter how insubstantial, create uncertainty that, if allowed to continue, will severely threaten the Bell System's ability to implement the MFJ and to provide telephone service for the Nation--both during the period of transition and beyond. The "state of limbo", moreover, would have repercussions far beyond the Bell System and unavoidably affect the entire telecommunications industry. District Court Order, dated April 8, 1982, p. 6; and see J.A. 206. The reasons include:

> A. Since this structural split of the Bell System was proposed on January 8, 1982, the Bell System has been foreclosed from issuing any BOC bonds, which traditionally provided the major portion of the outside financing for the expansion and modernization needed to provide telephone service. The Bell System cannot adequately finance its operations if the uncertainty is prolonged beyond January 1, 1984. Tr. 25130, 25456-57. The District Court repeatedly recognized the severe adverse impact that uncertainty has upon the Bell System's ability to raise necessary outside capital. J.A. 148, 206. As the District Court recognized, the "spill-over effects of the reorganization may be

expected to be similarly massive," to affect public and private non-Bell interests, and to cause them to delay important business and regulatory decisions as well. J.A. 206.

B. The uncertainty has, in the District Court's words, created a "state of limbo" for the Bell System's more than one million employees (as well as its bondholders and shareholders). April 8, 1982 Order, p. 6. For Bell System employees not to know with certainty where they will be working would impede implementation of the reorganization and strain vital operational decisions during the transitional period.

C. Finally, the fact that neither industry participants nor regulators can now know with certainty how the industry is to be structured will affect public decisionmaking until the uncertainty is removed. "[S]tate regulators will be prevented from establishing appropriate policies," April 8, 1982 Order, supra, p. 6, and private and public interests may "be delaying important business and regulatory decisions" J.A. 206.

4. In recognition of these factors, the District Court conducted the proceedings relating to entry of the MFJ in this case with the utmost expedition. The continued expedition of these cases is essential to put the potentially crippling uncertainty to a timely end. As the District

Court found "[i]mmediate consideration of the appeals by the Supreme Court would largely avoid all these problems." Id.

Wherefore AT&T prays, first, that this Court expedite the consideration and decision of AT&T's motion summarily to affirm the appeals and, second, in the event that oral argument is to be scheduled in any or all of the appeals, that it occur this Term.

Respectfully submitted,

HOWARD J. TRIENENS*
ALFRED A. GREEN
JIM G. KILPATRIC
195 Broadway
New York, New York 10007
(212) 393-5111

GEORGE L. SAUNDERS, JR.
JOHN D. ZEGLIS
DAVID W. CARPENTER
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

Attorneys for Appellees
Western Electric Company
and American Telephone And
Telegraph Company

December 22, 1982

* Counsel of Record

Nos. 82-952 & 82-1001

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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SUPREME COURT, U.S.

STATE OF MARYLAND, ET AL.,

Appellees,

v.

UNITED STATES OF AMERICA AND AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL.,

Appellants.

On Appeal from the United States District Court for the District of Columbia

RESPONSE OF THE STATE APPELLANTS TO MOTIONS TO EXPEDITE CONSIDERATION

The States of Maryland, Arizona, Delaware, Illinois, Missouri, New Hampshire, North Carolina, Tennessee and Wisconsin, The Commonwealth of Virginia, the Public Service Commissions of Alabama, Kentucky, Tennessee, West Virginia and Wisconsin, the Public Utilities Commission of South Dakota and the Virginia State Corporation Commission ("State Appellants") support the motions of the United States of America and American Telephone and Telegraph Company to the extent that these motions ask this Court to expedite this appeal by the earliest possible consideration of the jurisdictional questions before the Court and, if oral argument is permitted, the scheduling of briefing and oral argument within the present Term of this Court.

Although the parties disagree with regard to the merits and substance of the issues on appeal, it is agreed by all that immediate consideration of these appeals by this Court is of general public importance in the administration of justice.

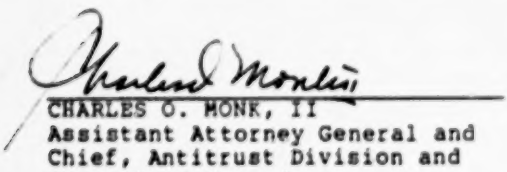
In addition, all parties agree that oral argument during this Term will serve the public interest and the interests of the parties. Prompt plenary consideration of the important questions raised by this appeal will prevent abrogation of State law, remove significant uncertainties presently overhanging the settlement, and will avoid needless settlement implementation efforts.

Accordingly, State Appellants concur with the Department of Justice and AT&T to the extent that, if this Court notes probable jurisdiction and sets this case for oral argument, briefing and argument should take place within the present Term of this Court.

DATED: December 30, 1982
0614Y

Respectfully submitted,

STEPHEN H. SACHS
Attorney General of Maryland



CHARLES O. MONK, II
Assistant Attorney General and
Chief, Antitrust Division and
Counsel of Record

ALAN M. BARR
Assistant Attorney General
The Munsey Building
7 North Calvert Street
Baltimore, Maryland 21201
(301) 576-6470

Attorneys for the State of
Maryland

ROBERT K. CORBIN
Attorney General

ANTHONY B. CHING
Solicitor General
1275 Washington Street
Phoenix, Arizona 85007
(602) 255-3333

Attorneys for the State of
Arizona

RICHARD S. GEBELEIN
Attorney General

VINCENT AMBERLY
Deputy Attorney General
820 North French Street
Wilmington, Delaware 19801
(302) 571-2514

Attorneys for the State of
Delaware

TYRONE C. FAHNER
Attorney General and
Counsel of Record

FREDRIC D. TANNENBAUM
Assistant Attorney General
Public Utilities Division
188 West Randolph Street
Suite 2315
Chicago, Illinois 60601
(312) 793-7780

Attorneys for the State of
Illinois

GREGORY H. SMITH
Attorney General

EDWARD E. LAWSON
Antitrust Counsel
State House Annex
Concord, New Hampshire 03301
(603) 271-3640

Attorneys for the State of
New Hampshire

WILLIAM M. LEECH, JR.
Attorney General

WILLIAM J. HAYNES, JR.
Deputy Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-2672

Attorneys for the State of
Tennessee

GERALD L. BALILES
Attorney General

WILLIAM G. BROADDUS
Chief Deputy Attorney General

ELIZABETH B. LACY
Deputy Attorney General

ANTHONY GAMBARDELLA
Assistant Attorney General
101 8th Street
Richmond, Virginia 23219
(804) 786-4076

Attorneys for the Commonwealth
of Virginia

JOHN D. ASHCROFT
Attorney General

EDWARD D. ROBERTSON, JR.
Deputy Attorney General
P.O. Box 899
Jefferson City, Missouri 65102
(314) 751-3321

Attorneys for the State of
Missouri

H. A. COLE, JR.
Special Deputy Attorney General
Chief, Antitrust Division

FRED R. GAMIN
North Carolina Department of
Justice
P.O. Box 629
Raleigh, North Carolina 27602
(919) 733-3786

Attorneys for the State of
North Carolina

BRONSON C. LAFOLETTE
Attorney General

MICHAEL L. ZALESKI
Assistant Attorney General

KEVIN J. O'CONNOR
Assistant Attorney General
Antitrust and Criminal
Litigation Unit
P.O. Box 7857
Madison, Wisconsin 53707
(608) 266-3016

Attorneys for the State of
Wisconsin

MARK D. WILKERSON
Special Assistant Attorney
General

EUELL SCREWS
Assistant Attorney General
State Office Building
339 Dexter Avenue
P.O. Box 991
Montgomery, Alabama 36102
(205) 832-6282

Attorneys for the Alabama
Public Service Commission

WILLIAM M. SAWYER
ELLYN ELISE CRUTCHER
PAUL M. CUPP
JOHN H. HUGHES
730 Schenkel Lane
Frankfort, Kentucky 40602
(502) 564-7347

Attorneys for the Kentucky Public Service Commission

ROBERT RODECKER
General Counsel

JOEL B. SCHIFMAN
Telecommunications Attorney
Legal Division
State Capital
Charleston, West Virginia
(304) 348-3890

Counsel for the Public Service Commission of West Virginia

RUSSELL W. CUNNINGHAM
Associate General Counsel

SHERRY H. BRIDEWELL
Attorney
P.O. Box 1197
Richmond, Virginia 23209
(804) 786-8671

Attorneys for the Virginia State Corporation Commission

HENRY M. WALKER
General Counsel
State of Tennessee
Cordell Hull Building
Nashville, Tennessee 37219
(615) 741-3191

Attorney for the Tennessee Public Service Commission

PHILIP J. MAUSE
Kadison, Pfaelzer, Woodard, Quinn & Rossi
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 452-8300

Attorney for the Wisconsin Public Service Commission

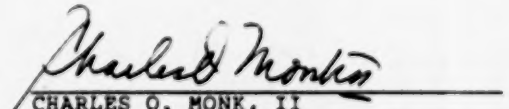
JAMES M. LYONS
FREDERICK J. BAUMANN
1600 Broadway, Suite 2400
Denver, Colorado 80202

MARCUS W. SISK, JR.
Sisk, Foley, Hultin & Driver
2501 M Street, N.W.
Washington, D.C. 20037

Attorneys for the South Dakota Public Utilities Commission

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of December, 1982, a copy of the aforegoing Response of the State Appellant to Motions to Expedite Consideration was mailed, first-class postage prepaid, to all counsel of record, as identified in the attached service list. I further certify that all parties required to be served have been served.



CHARLES O. MONK, II
Assistant Attorney General and
Chief, Antitrust Division

SERVICE LIST

William F. Baxter
Ronald G. Carr
Richard O. Levine
James P. Denvir
Antitrust Division
United States Department
of Justice
Washington, D,C. 20530

George L. Saunders, Jr.
John D. Zeglis
Lee M. Mitchell
Sidley & Austin
American Telephone & Telegraph
Company
499 South Capitol Street, N.W.
8th Floor
Washington, D.C. 20003

Joseph M. Kittner
Counsel for Ad Hoc
Telecommunications Users Committee,
Compuserve, Inc.,
Computer & Business Equipment
Manufacturers Association
McKenna, Wilkinson & Kittner
1150 17th Street, N.W.
Washington, D.C. 20036

Richard E. Wiley
Counsel for American Newspaper
Publishers Assoc.,
National Newspaper Association
Kirkland & Ellis
1776 K Street, N.W.
Washington, D.C., 20006

Charles M. Meehan
Counsel for American Petroleum
Institute
Keller & Heckman
1150 17th Street, N.W.
Suite 1000
Washington, D.C. 20036

Stanley R. Jones
Counsel for San/Bar
Jackson, Jones & Price
Irvine Law Building
17592 Irvine Boulevard
Tustin, CA 96280

Rex E. Lee
Solicitor General of
the United States
U.S. Department of Justice
Washington, D.C. 20530

William D. English
Counsel for Satellite Business
Systems
8283 Greensboro Drive
McLean, VA 22102

Virginia S. Carson
Counsel for Sonitrol Distributors
Council
Anderson, Hibey, Nauheim & Blair
1605 New Hampshire Avenue
Washington, D.C. 20009

J. Roger Wollenberg
Counsel for Southern Pacific
Communications Company
Wilmer, Cutler & Pickering
1666 K Street, N.W.
Washington, D.C. 20006

Alan Raywid
Counsel for Sperry Corporation
Cole, Raywid & Braverman
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006

Malcolm Pfunder
Counsel for Tandy Corporation
Hamel, Park, McCabe & Saunders
888 16th Street, N.W.
Washington, D.C. 20006

Joan M. Griffin
Counsel for American Satellite Company
1801 Research Boulevard
Rockville, MD 20850

David L. Hill
Counsel for Asso. Telephone Answering Exchanges, Inc.
1225 19th Street, N.W.
Suite 340
Washington, D.C. 20036

R. Scott Gardner
Counsel for Asso. of American Railroads
1920 L Street, N.W.
Washington, D.C. 20036

Deborah S. Trinker
Counsel for Asso. of Data Communications Users
Keller & Heckman
1150 17th Street, N.W.
Suite 1000
Washington, D.C. 20036

Joseph P. Markowski
Counsel for Asso. of Data Processing Service Organizations, Inc.
Squire, Sanders & Dempsey
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Victor J. Toth
Counsel for Assoc. of Long Distance Telephone Co.
2719 Soapstone Drive
Reston, VA 22901

James H. Johnston
Counsel for Audichron Company
Cohn & Marks
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Leo I. George
Counsel for U.S. Telephone Communcations
1522 K Street, N.W.
Suite 900
Washington, D.C. 20005

Thomas J. O'Reilly
Counsel for United States Independent Telephone Association
Shelley, Sternad, Dempsey, Chadbourne, Parke, Whiteside & Wolfe
1101 Vermont Avenue, N.W.
Washington, D.C. 20554

Dean Burch
Counsel for the United States Telecommunications Suppliers Association
The Independent Telecommuncations Suppliers Council
Pierson, Ball & Dowd
1200 18th Street, N.W.
Ring Building
Washington, D.C. 20006

Hayward D. Fisk
United Telecommunications, Inc.
1875 Eye Street, N.W.
Suite 1250
Washington, D.C. 20006

John S. Dodd
Counsel for United Telecommuncations
Executive Vice-President & General Counsel
Post Office Box 11315
Kansas City, MO 64112

Larry S. Solomon
Keller & Heckman
Counsel for Utilities Telecommunications Council,
American Petroleum Institute
1150 17th Street, N.W. Suite 1000
Washington, D.C. 20036

Milton J. Grossman
Counsel for Western Union Telegraph Company
1000 Connecticut Avenue, N.W.
Suite 1200
Washington, D.C. 20036

Jeffrey H. Olson
Black Citizens for
Fair Media,
Counsel for National Latino Media
Coalition,
Congress Watch,
National Asso. for Better Broadcasting,
National Citizens Committee for
Broadcasting,
NAACP
Citizens Communications Center
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001

Steven J. Mehlman
Counsel for California Hispanics
Furth, Fahrner, Bluemle & Mason
201 Sansome Street
Suite 1000
San Francisco, CA 97104

Theodore D. Frank
Counsel for Centel Corporation
Arent, Fox, Kintner, Plotkin,
& Kahn
1815 H Street, N.W.
Washington, D.C. 20006

John H. Engel
General Counsel
Citizens Utilities
Company
High Ridger Park
Samford, CN 06905

Patrick M. Scanlon
Counsel for Communications Workers
of America
Adair & Goldthwaite
1925 K Street, N.W.
Suite 411
Washington, D.C. 20006

F. Sherwood Lewis
Counsel for Computer & Communications
Industry Association
Rivkin & Lewis
11 Dupont Circle, N.W.
Suite 700
Washington, D.C. 20036

Janice E. Kerr
State of California
California P.U.C.
5066 State Building
San Francisco, CA 94102

Eugene C. Cavaliere
Assistant Attorney General
State of Colorado
1525 Sherman Street
Denver, CO 80203

Frederick D. Tannebaum
Assistant Attorney General
State of Illinois
188 West Randolph Street
Suite 2315
Chicago, IL 60601

James E. Tierney
Attorney General for the State
of Maine
State House
Station No. 6
Augusta, ME 04333

John M. Dempsey
Assistant Attorney General
Counsel for the State of Michigan
1000 Long Boulevard, Suite 11
Lansing, Michigan 48910

Richard H. Levin
Deputy Attorney General
State of New Mexico
Post Office Drawer 1508
Santa Fe, N.M. 87504

Jerrold Oppenheim
Melvyn R. Levinthal
Assistant Attorneys General
State of New York
Room 4612
Two World Trade Center
New York, NY 10047

Richard L. Caswell
Assistant Attorney General
State of Oregon
100 State Office Building
Salem, OR 97301

Irwin Schneiderman
Counsel for Continental Telcom
Cahill, Gordon & Reindel
1990 K Street, N.W.
Washington, D.C. 20006

Stephen A. Sharp
Counsel for Pederal Communications Commission
Federal Communications Commission
General Counsel
Washington, D.C. 20554

Louis Frey, Jr.
Counsel for General Dynamics Communications Company, Stromberg-Carlson Corporation
Pepper, Hamilton & Scheetz
1777 F Street, N.W.
Washington, D.C. 20006

Gail Polivy
Counsel for General Telephone & Electronics
1120 Connecticut Avenue
Suite 900
Washington, D.C. 20006

Herbert E. Marks, Esquire
Counsel for Independent Data Communications Manufacturers Association
Wilkinson, Cragun & Barker
1735 New York Avenue, N.W.
Washington, D.C. 20006

Grant S. Lewis
Counsel for Independent Telecommuncations Suppliers Council,
International Telephone & Telegraph
LeBoeuf, Lamb, Leiby & MacRae
520 Madison Avenue
New York, NY 10022

John W. Fields
Counsel for Jack Faucett Asso., et al.
Howrey & Simon
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Eugene F. Waye
John L. Shearburn
Deputy Attorneys General
State of Pennsylvania
1645 Strawberry Square
Harrisburgh, PA 17120

Robert H. Wood, Jr.
Chief Counsel
Public Utilities Commission of Arkansas
P.O. Box C-400
Little Rock, AR 72203

Lloyd N. Moore, Jr.
General Counsel
District of Columbia P.S.C.
451 Indiana Avenue, N.W.
Washington, D.C. 20006

Patrick K. Wiggins
Deputy General Counsel
Florida Public Service Commission
101 East Gaines Street
Tallahassee, FL 32301-8153

Donald A. Low
Assistant General Counsel
Counsel for Kansas State Corp. Comm.
4th Floor, State Office Building
Topeka, KS 66612

Hercules J. Bolos
Chief Counsel
Illinois Commerce Commission
228 North LaSalle Street
Suite 1300
Chicago, IL 60601

Frank J. Kelley
Attorney General for the State of Michigan and for Michigan P.S.C.
100 Long Boulevard
Suite 11
Lansing, MI 48910

Kent M. Ragsdale
General Counsel
Public Service Commission of Missouri
P.O. Box 360
Jefferson City, MO 65102

Robert W. Ross
Counsel for Leghorn Telepublishing Co.
Pepper, Hamilton & Scheetz
1777 F Street, N.W.
Washington, D.C. 20006

Chester T. Kamin
Michael H. Salisbury
Counsel for MCI Communications Corporation
Jenner & Block
One IBM Plaza
Chicago, IL 60611

John R. Worthington, Esquire
Senior Vice President and General Counsel
MCI Communications Corporation
1133 19th Street, N.W.
Washington, D.C. 20036

Martin B. Bercovici
Counsel for Mobile Marine Radio, Inc.
Keller & Heckman
1150 17th Street, N.W.
Suite 1000
Washington, D.C. 20036

Erwin G. Krasnow
Counsel for National Asso. of Broadcasters,
Westinghouse Broadcasting & Cable
1771 N Street, N.W.
Washington, D.C. 20036

Paul Rodgers
General Counsel
National Association of Regulatory Utility Commissioners
1102 ICC Building
Post Office Box 684
Washington, D.C. 20044

Jack Shreve
Counsel for National Association of State Utility Consumer Advocates
Florida Public Counsel
Room 4, Holland Building
Tallahassee, FL 32301

Eric A. Eisen
Lisa A. Ross
Counsel for Missouri P.S.C.
Birch, Horton, Buttner & Monroe
1140 Connecticut Avenue, N.W.
Suite 1100
Washington, D.C. 20036

Chairman Harold Simpson
Nebraska Public Utilities Commission
301 Centennial Mall South
Lincoln, Nebraska 68509

Zev. E. Kaplan
Legal Counsel
Public Utilities Commission of Nevada
505 E. King Street
Carson City, NV 89710

Paul L. Gioia
Counsel for New York Public Utilities Commission
Three Empire State Plaza
Albany, NY 12223

James M. Lyons
Lynne Eisaguirre
Rothergerber, Appel & Powers
Counsel for Idaho Public Utilities Comm,
Counsel for Montana Public Utilities Comm.,
Counsel for Utah Public Utilities Comm.,
Counsel for Wyoming Public Utilities Comm.,
Counsel for Iowa Commerce Comm.,
Counsel for New Mexico Corporation Comm.,
Counsel for Oklahoma Corporation Comm.
1600 Broadway, 24th Floor
Denver, CO 80202

Douglas N. Owens
Asst. Attorney General
Temple of Justice
Counsel for Washington Trans. Utilities Comm.
Olympia, WA 98504

Richard A. Castellini
City Solicitor
City of Cincinnati
801 Plum Street
Cincinnati, OH 45202

Jay E. Ricks
Counsel for National Cable
Television Association,
Warner Amex Cabel Communications
Hogal & Hartson
816 Connecticut Avenue, N.W.
Washington, D.C. 20006

Edwin B. Spievack
Counsel for North American Telephone
Association
Cohn & Marks
1333 New Hampshire Avenue
Washington, D.C. 20036

J. Robert Sheehy
Counsel for Northeastern Telephone Co.
Sheely, Lovelace, Maryfield
1200 American-Amicable Building
Waco, TX 76701

Lewis J. Paper
Counsel for Office of Communication
United Church of Christ,
Reformed Church in America,
Natl. Catholic Broadcasters Asso.,
Education & Cultivation Division of
the General Board of Global
Ministries of the United Methodist
Church,
Communication Comm. of the National
Counsel of Churches of Christ-U.S.A.
Grove, Engelberg & Gross
2033 M Street, N.W.
Suite 404
Washington, D.C. 20036

Kenneth Hardman
Counsel for Rogers Radio
Communications Services,
D/FW Signal,
Telocater Network of America
Fortas & Koven
1200 29th Street, N.W.
Washington, D.C. 20007

David Cosson
Counsel for Rural Telephone Coalition
2626 Pennsylvania Avenue, N.W.
Washington, D.C. 20037

Frederick A. O. Schwarz
Corp. Counsel for the City of
New York
100 Church Street
New York, NY 10007

John Parks Hopkins
Counsel for Ohio Consumers Counsel
137 East State Street
Columbus, OH 43215

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Nos. 82-952, 82-953

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF MARYLAND, et al.,

Appellants,

—v.—

UNITED STATES OF AMERICA and AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al.,

Appellees.

TANDY CORP.,

Appellant,

—v.—

UNITED STATES OF AMERICA, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF TELEPHONIC EQUIPMENT CORPORATION FOR LEAVE TO INTERVENE

GRANT S. LEWIS
Counsel of Record
520 Madison Avenue
New York, N.Y. 10022
(212) 715-8000

Of Counsel:

Charles C. Platt
LeBoeuf, Lamb, Leiby & MacRae

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MOTION OF TELEPHONIC EQUIPMENT CORPORATION FOR LEAVE TO INTERVENE

PRELIMINARY STATEMENT

Telephonic Equipment Corporation ("TEC") moves to intervene in these cases to present certain issues, raised in the Tunney Act proceedings below, that vitally affect private

plaintiffs engaged in litigation against the Bell System defendants.

TEC is a small manufacturer of telecommunications equipment, with annual sales of less than $2,000,000. Defendants' efforts to prevent TEC from selling its products were relied upon by the government as part of its case-in-chief. TEC is about to file antitrust litigation against defendants and, as contemplated by Congress, seeks to rely on the prior government proceeding to the extent feasible.

In the district court's order pursuant to 15 U.S.C. § 29(b), it listed "issues that are of significant importance to the administration of justice." Included among those issues was the "authority of the district court to restrict the use that may be made of the consent decree by private parties." Determination of this question, and a related question under Section 2(e)(2) of the Tunney Act, 15 U.S.C. § 16(e)(2), are important not only to TEC and other companies challenging defendants' past conduct in private suits, but all future private litigants who may seek to rely on government proceedings to assist their litigation efforts.

The only intervenor-appellant which sought to address "private plaintiff" issues did not perfect its appeal. Accordingly, TEC moves to do so.

STATEMENT OF THE CASE

A. United States v. AT&T

United States v. American Telephone and Telegraph Company, et al., Civil Action No. 74-1698 (the "*AT&T* action"), was commenced in November, 1974, in the United States District Court for the District of Columbia. The government alleged that defendants American Telephone and Telegraph Company, Western Electric Company, Inc., and Bell Telephone Laboratories Inc. (collectively, "AT&T" or "defendants") had monopolized a broad variety of telecommunications services and equipment in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

The government and AT&T attempted to reach a settlement in the district court "before any testimony . . . [was] taken," and thereby prevent future private litigants from availing themselves of the *prima facie* case afforded them by Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a) ("Section 5(a)"). 1980-81 Trade Cas. ¶ 63,705. Those efforts failed, and the government's presentation of evidence began on March 4, 1981. After defendants' motion to dismiss at the close of the government's case was denied, 524 F. Supp. 1336, defendants commenced their case on August 3, 1981, and continued their presentation of evidence for five months.

On January 8, 1982, less than one month before trial of the *AT&T* action was scheduled to end, and after approximately 350 witnesses had testified, the parties to that action filed a stipulation in the United States District Court for the District of New Jersey consenting to the "modification" of a final consent judgment that had been entered by that court in 1956 in *United States v. Western Electric Company, Inc., et al.*, Civil Action No. 17-49 (the "*Western Electric* action"). Simultaneously, the parties sought to file a stipulation of dismissal of the *AT&T* action. Judge Vincent Biunno of the New Jersey district court immediately approved the proposed modification of the 1956 consent judgment, but Judge Harold Greene, who presided over the *AT&T* action in the District of Columbia, ordered that the stipulation of dismissal in the *AT&T* action be lodged, not filed, until public interest proceedings contemplated by the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b) *et seq.* (also known as the "Tunney Act"), were completed. Thereafter, the *Western Electric* action was transferred to the District Court for the District of Columbia, docketed under Civil Action No. 82-0192, and consolidated with the *AT&T* action. Judge Greene then vacated Judge Biunno's approval of the proposed modification, and ordered that Tunney Act procedures be employed.

B. The Tunney Act Proceedings

In an order dated February 5, 1982, the district court established a sixty-day comment period on the proposed consent decree, pursuant to Section 2(b) of the Tunney Act. The district court also created a separate public interest proceeding docket, Misc. No. 82-0025 (PI), for the filing of all documents that related to the Tunney Act proceedings.

In accordance with Section 2(b) of the Tunney Act, the government filed a competitive impact statement, and thereafter numerous participants, including TEC, filed comments. TEC was one of a number of companies which called on the court to require certain modifications and conditions that would protect the rights of private plaintiffs asserting claims against defendants.

First, to prevent the apparent effort by the government and defendants to nullify Section 5(a), TEC requested that the third sentence of Section III of the proposed decree be stricken. That sentence states:

> "Neither this Modification of the Final Judgment nor any of its terms or provisions shall constitute any evidence against, admission by, or any estoppel against any party [or Bell Operating Company]."

For the same reason, TEC called on the court to insist that the decree be entered in the *AT&T* action, and not as a modification of the *Western Electric* judgment (on which no testimony had ever been taken).

Second, TEC urged the court to consider "[t]he impact of entry of [the proposed decree] . . . upon . . . individuals alleging specific injury from the violations set forth in the complaint including the public benefit, if any, to be derived from a determination of the issues at trial," as provided for in Section 2(e)(2) of the Tunney Act, 15 U.S.C. § 16(e)(2). As an alternative to a rejection of the decree on this basis, TEC urged the court to consider conditioning its approval of the decree on

defendants' acceptance of reasonable conditions that would assist private plaintiffs in litigation related to the *AT&T* action.

C. Judge Greene's opinion

On August 11, 1982, the district court issued an opinion approving the proposed consent decree (with certain exceptions that are not now germane), and on August 24, 1982, entered two orders permitting the dismissal of the *AT&T* action, and the filing of the consent decree as a modification of the final judgment in the *Western Electric* action. The court declined to strike the third sentence of Section III. Instead, it relied on this sentence in suggesting that, despite Section 5(a), "the judgment herein would not have a *prima facie* effect in private litigation." Opinion, at 147-48. Also, while both the government (in its competitive impact statement) and the defendants had contended that Section 5(a) was inapplicable because the decree was being entered in the *Western Electric* action, and not the *AT&T* case, the district court permitted the decree to be entered in the *Western Electric* action, describing this "defect" as only a "technical [one which] does not affect substantive rights and duties." Order dismissing *AT&T* action, at 1. Finally, the court adopted a standard for considering whether it should approve the decree that expressly excluded "consideration of the public benefit, if any, to be derived from a determination of the issues at trial," despite its recognition that this criterion "directs the Court to consider the effect of the proposed decree upon the ability of private antitrust plaintiffs to recover against the defendant for injuries alleged to have resulted from the activity challenged in the government [suit]." Opinion, at 35 n. 93.

D. TEC's Motion to Intervene

TEC moved to intervene in the district court on September 1, 1982 for the purpose of appealing Judge Greene's opinion, but the court denied TEC's motion as untimely. TEC appealed that denial to the United States Court of Appeals for the

District of Columbia Circuit, and, after another intervenor moved pursuant to 15 U.S.C. § 29(b) for direct review of all appeals by this Court, TEC submitted a similar motion for direct review. In an order dated November 10, 1982, Judge Greene granted all the motions for direct review except that of TEC. In that order he stated:

> "it would not be in the public interest or the administration of justice to have two review proceedings involving this one case proceeding simultaneously—one by way of an immediate appeal to the Supreme Court and the other by a more lengthy review proceeding through the Court of Appeals. Such a procedure would also be contrary to the basic purpose of the Expediting Act."

Order, at 4.

Despite this statement, Judge Greene declined to act on TEC's motion for direct review, and TEC's appeal is accordingly still in the court of appeals. That appeal is believed to be the only one involving the *AT&T* or *Western Electric* actions that is not now before this Court.

REASONS FOR GRANTING THIS MOTION

THE RIGHTS OF POTENTIAL PRIVATE PLAINTIFFS SUCH AS TEC WILL BE VITALLY AFFECTED BY THE PROPOSED DECREE, AND THERE IS PRESENTLY NO REPRESENTATIVE IN THIS COURT TO DEFEND THOSE RIGHTS.

TEC's appeal should have been certified by the district court for direct review, pursuant to 15 U.S.C. § 29(b), to ensure that TEC had the opportunity to protect its interest before this Court and to avoid simultaneous proceedings before this Court and the court of appeals. *See, e.g., Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 132 (1967); *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961); *Allen Calculators, Inc. v. National Cash Register Co.*, 322

U.S. 111 (1944); *United States v. California Cooperative Canneries*, 279 U.S. 553 (1929).

In any event, TEC respectfully submits that it should be permitted to intervene in the proceedings before this Court, because its rights and the rights of other potential private plaintiffs have been vitally affected by the proposed consent decree, there presently is no other representative in this Court to defend these rights, and TEC will lose the opportunity to protect effectively these rights if intervention is denied. Intervention has been granted by this Court in similar circumstances, *see, e.g., Labor Board v. Acme Industrial Co.*, 384 U.S. 925 (1966); *Eastern-Central Motor Carriers Ass'n v. United States*, 321 U.S. 194, 198-99 (1944); *United States v. Terminal R.R. Ass'n*, 236 U.S. 194, 199 (1915), and it clearly would serve the interests of justice in this case.

A. The District Court Erred When It Sought To Limit The Use That May Be Made Of The Consent Decree By Private Parties.

In its order pursuant to 15 U.S.C. § 29(b) on November 10, 1982, the district court recognized the "significant importance" of the question of its "authority . . . to restrict the use that may be made of the consent decree by private parties." Order, at 3. As mentioned earlier, the district court approved the decree despite the provision therein that it "shall not constitute any evidence against, admission by, or any estoppel against any party . . .," and also permitted the decree to be entered in the *Western Electric* action, not the *AT&T* suit.

Section 5(a) of the Clayton Act provides:

> A final judgment or decree . . . rendered in any . . . proceeding brought by . . . the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree

> would be estoppel as between the parties thereto: *provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken. . . .

A consent decree entered in a government antitrust action after testimony has been taken is typically entitled to be used at least as *prima facie* evidence in subsequent private civil litigation based on the government's case. *See Y&Y Popcorn Supply Co. v. ABC Vending Corp.*, 263 F. Supp. 709, 712-13 (E.D. Pa. 1967); *State of Michigan v. Morton Salt Co.*, 259 F. Supp. 35, 61-63 (D. Minn. 1966), *aff'd sub nom. Hardy Salt Co. v. State of Illinois*, 377 F.2d 768 (8th Cir. 1967);[1] *see also Sablosky v. Paramount Film Distributing Corp.*, 137 F. Supp.

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1 In this case, the court held that a civil consent decree, entered into by defendant International Salt Company before the government's civil trial, but after a criminal trial in which International was acquitted, was entitled to *prima facie* effect in subsequent private actions under Section 5(a). The court reasoned that the *proviso* clause of Section 5(a), which would have precluded such a *prima facie* effect, was "meant to encourage prompt capitulation, thereby saving the Government the time and expense of a full scale trial." *Id.* at 62. It concluded that "no saving was passed on to the United States" in this instance, because testimony had already been taken at International's criminal trial, and that testimony was a principal basis of the government's non-jury civil trial. *Id.*

The decree in *Morton Salt* contained a recital that "it was entered . . . without adjudicating any question of law or fact." *Id.* at 62. The court explained that such an exculpatory recital cannot prevent a court in a subsequent private civil action "from considering whether it would be consistent with the purpose of Section 5(a) to allow the decree to exempt a defendant from the *prima facie* rule." *Id.* The court stated that Section 5(a) "should not be construed to demand an explicit statement in the judgment or decree that Defendant X has violated the antitrust laws. Judged in light of what the complaint charged, it is possible to ascertain that International's consent decree effectively determines that it violated the antitrust laws." *Id.* at 62. The same is also true in the present case in which the government secured defendants' agreement to the most substantial divestiture in the history of the antitrust laws. *Cf. Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 485 (1968).

929 (E.D. Pa. 1955); *DeLuxe Theatre Corp. v. Balaban & Katz Corp.*, 95 F. Supp. 983 (N.D. Ill. 1951); *Twin Ports Oil Co. v. Pure Oil Co.*, 26 F. Supp. 366, 371 (D. Minn. 1939).

The intent of this Section was "to minimize the burdens of litigation for injured private suitors" in their actions for damages against violators of the antitrust laws. *Emrich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 568, (1951). *Accord Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 319 (1965); *Windham v. America Brands, Inc.*, 538 F.2d 1016 (4th Cir. 1976); *Wendkos v. ABC Consolidated Corp.*, 379 F. Supp. 15 (E.D. Pa. 1974); H.R. Rep. No. 96-874, 96th Cong. 2d Sess. 4, *reprinted in* [1980] U.S. Code Cong. & Ad. News 2752, 2754.

While the district court's opinion correctly recognized that the ultimate decision concerning the *prima facie* effect of the decree under Section 5(a) must rest with the court that presides over the private litigation, Opinion at 148; *see State of Michigan v. Morton Salt Co.*, 259 F. Supp. 35, 61-63 (D. Minn. 1966), *aff'd sub nom. Hardy Salt Co. v. State of Illinois*, 377 F.2d 768 (8th Cir. 1967); *see also Emrich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 569-71 (1951), the court erred when it permitted language to be included in the decree which purported to answer the question.

In addition, the district court should have required that the decree be entered in the case which was being settled; that is, the *AT&T* action, and not the *Western Electric* action. While the opinion characterizes the *Western Electric* ploy as a "transparent device" to "escape either the mandate of the law or the possibility of liability," Opinion, at 147, it ultimately approved this "defect," believing it to be only "technical and [one which] does not affect substantive rights or duties." Order dismissing the *AT&T* action, at 1. In earlier filings, however, both the government and defendants had contended that Section 5(a) was inapplicable because the decree was being entered in the *Western Electric* action, and not the *AT&T* case, and defendants will undoubtedly do so again. In light of the position of

the parties, the court erred when it permitted the decree to be entered in the *Western Electric* action.

B. The District Court Erred When It Adopted A Standard For Evaluating The Decree That Excluded "Consideration Of The Public Benefit, If Any, To Be Derived From A Determination Of The Issues At Trial."

Congress's desire to assist private plaintiffs is also reflected in the Tunney Act. Section 2(e)(2) of the Tunney Act provides in part:

> (e) Before entering any consent judgment proposed by the United States under this Section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court may consider—
>
> * * *
>
> (2) The impact of entry of such judgment upon . . . individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

See S. Rep. No. 93-298, 93rd Cong. 2d Sess. 6-7, *reprinted in* [1974] U.S. Code Cong. & Ad. News 6535, 6539; *United States v. Associated Milk Producers, Inc.*, 394 F. Supp. 29, 43 (W.D. Mo. 1975), *aff'd*, 534 F.2d 113 (8th Cir.), *cert. denied*, 429 U.S. 940 (1976).[2]

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2 Similarly, Section 2(b)(4) of the Tunney Act provides that the government must file, along with its proposed consent decree in a civil antitrust case, a competitive impact statement that recites, *inter alia*,

> (a) the remedies available to potential private plaintiffs damaged by the alleged violation [of the antitrust laws] in the event that such proposal for the consent judgment is entered in such proceeding.

Although the district court recognized that this provision "directs the court to consider the effect of the proposed decree upon the ability of private antitrust plaintiffs to recover against the defendant for injuries alleged to have resulted from the activity challenged by the government," it viewed this factor as "secondary," and adopted a standard for determining whether the decree should be approved which expressly excluded this consideration. Opinion, at 35 n. 93.

The district court did indicate that the "vigor with which several private plaintiffs have pursued actions against AT&T indicates that further prosecution of the government's case is not warranted on this basis." *Id.* While it is true that large companies such as MCI Telecommunications Corp. and Litton Industries, Inc. have been able to pursue such claims against defendants, and to secure very large judgments, smaller companies face enormous obstacles in taking on the largest company in the world, a company which has already spent hundreds of millions of dollars seeking to defend its conduct. The government spent seven and a half years and a great deal of money to substantiate its charges against defendants. Congress contemplated that private plaintiffs would benefit from such efforts.

If the government's case had gone to judgment, future plaintiffs would have been able to avail themselves of the doctrine of collateral estoppel. TEC does not contend that the court was required to reject the proposed decree on this basis and force the parties to conclude the trial. It urges, however, that the court did err when it refused even to consider that possibility (or, as an alternative, to consider what reasonable conditions might have been imposed on defendants to assist plaintiffs asserting private claims).[3]

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3 In view of the court's familiarity with what had transpired, TEC called on the court to address this final issue independently. Among TEC's suggestions for the court's consideration were: (1) that defendants to the *AT&T* action agree to stipulate with private plaintiffs any fact that they stipulated with the government; (2) that a depository be

CONCLUSION

The motion of Telephonic Equipment Corporation for leave to intervene in these proceedings should be granted for the reasons stated above.

Dated: New York, N.Y.
December 15, 1982

Respectfully submitted,

/s/ GRANT S. LEWIS
Grant S. Lewis
Attorney for Telephonic Equipment Corporation
520 Madison Avenue
New York, N.Y. 10022
(212) 715-8000

Of Counsel:

Charles C. Platt
LeBoeuf, Lamb, Leiby & MacRae

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created in AT&T's headquarters in New York and the District of Columbia for hard copies of all documents and computer files relating to the *AT&T* action; (3) that defendants furnish, at their expense, copies of AT&T discovery materials to future private plaintiffs if those materials are relevant to the future litigation; (4) that "records retention" policies presently in effect in the AT&T action continue for at least one year, and thereafter so long as any private litigation relating to the *AT&T* action is pending; (5) that deposition and trial testimony taken in the *AT&T* action be admissible aganst defendants in relevant future private litigation; (6) and that the documents introduced at the *AT&T* trial, or stipulated to be authentic prior to that trial, be deemed authentic under Rule 901 of the Federal Rules of Evidence in relevant future private litigation against defendants. In addition, TEC suggested that the district court consider making specific findings of fact, based upon the record that was made, in order to assist future courts that are called upon to consider the effect to be given the proposed judgment.

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DEC 28 1982
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-952

STATE OF MARYLAND, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

No. 82-953

TANDY CORP., APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

RESPONSE OF THE UNITED STATES TO TELEPHONIC EQUIPMENT CORPORATION'S MOTION FOR LEAVE TO INTERVENE

The United States hereby opposes the motion of Telephonic Equipment Corporation ("TEC") for leave to intervene in these cases for the purpose of raising new issues relating to the judgment's effect on private lawsuits against AT&T.

1. TEC is a competitor of AT&T in the manufacture of telecommunications equipment. After the government first published the proposed modification of final judgment and competitive impact statement in this case (47 Fed. Reg. 7171 (1982)), __/ TEC filed comments in the district court. Subsequently, on May 25, 1982, the district court directed all

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__/ The proceedings in the district court are described in greater detail in the government's Motion to Affirm at 3-9.

interested persons to file briefs on several issues, including the scope of the "public interest" determination required under the Tunney Act, 15 U.S.C. 16(e). Order of May 25, 1982, at 6. In the same order, the court also required interested persons to "indicate whether they request participation as intervenors * * *" (id. at 5 n.14). Many persons filed briefs and requested leave to intervene, but TEC did neither.

On August 11, 1982, the district court issued a lengthy opinion on the proposed decree (No. 82-952 J.S. App. 1-172), in which it considered the objections of several persons to the decree's disclaimer of liability. The court ruled that the effect of the disclaimer under Section 5(a) of the Clayton Act (15 U.S.C. 16(a)) __/ was a matter to be decided in the course of future private antitrust litigation and concluded that the provision provided no ground for withholding approval of the decree (No. 82-952 J.S. App. 142-144). On August 24, 1982, the district court entered the consent decree. On August 26, 1982, the court granted numerous motions to intervene for the purposes of appeal or participating in ongoing decree proceedings (id. at 191-194). On September 1, 1982, TEC moved to intervene, but the district court denied the motion as untimely. The court also denied TEC's motion for certification of a direct appeal to this Court (see id. at 205 n.2, 207 n.9). On December 16, 1982, TEC moved to intervene in this Court.

2. The district court gave TEC ample opportunity to seek timely intervention, but it failed to do so. Accordingly, TEC bears a heavy burden of showing that it should be allowed the extraordinary step of intervention in this Court. That burden is

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__/ Section 5(a) of the Clayton Act provides that a final judgment entered in a government antitrust case "to the effect that a defendant has violated [these] laws shall be prima facie evidence against [a] defendant [in a private action] as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto." Section 5(a) further provides that this prima facie effect is not available with respect to consent judgments entered before testimony is taken.

especially heavy here, since TEC seeks to inject into the Court's proceedings the issue of the decree's disclaimer of liability, which none of the numerous appellants has raised. __/ Responses to the timely-filed jurisdictional statements have already been filed, and allowing TEC to intervene and file its own jurisdictional statement would seriously and needlessly delay resolution of this case. In these circumstances, it is clear that TEC has not demonstrated that intervention is warranted.

This Court generally has allowed de novo intervention only in unusual circumstances where the applicants would qualify to intervene in the district court as of right or by statute under Fed. R. Civ. P. 24(a). See R. Stern & E. Gressman, Supreme Court Practice, 435-436 (5th ed. 1978); NLRB v. Acme Industrial Co., 384 U.S. 925 (1966) (union party to NLRB proceeding); Eastern-Central Motor Carrier Association v. United States, 321 U.S. 194, 198 n.5 (1944) (shipper organization party before ICC); United States v. St. Louis Terminal, 236 U.S. 194, 199 (1915) (shippers precluded by decree from use of rail service). Where the applicant for intervention lacked a sufficient interest to permit it to intervene as of right in the district court, however, this Court has denied intervention. See United States v. Paramount Pictures, Inc., 334 U.S. 131, 176-178 (1948); United States v. Patterson, 56 U.S. (15 How.) 10, 12-13 (1853).

TEC's interest in its own private suit would not entitle it to intervene as of right under Rule 24(a) in a government antitrust case. As this Court has recognized, government and private remedies for antitrust violations are separate and independent. United States v. Borden Co., 347 U.S. 514, 518-519 (1954). TEC does not allege that the judgment in this case will preclude any

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__/ In addition to the appeals in which TEC seeks to intervene, two other appeals have been taken from the district court's decision below. North American Telephone Ass'n v. United States, et al., No. 82-992, and Illinois v. United States, et al., No. 82-1001.

relief that it may seek against AT&T, and the possibility that the settlement of a government case may, as a practical matter, make relief sought by a private party somewhat more difficult to obtain than if the government had continued to litigate and won a judgment has never been held sufficient to support intervention as of right. See, e.g., Sam Fox Publishing Co. v. United States, 366 U.S. 688-690, 695 (1961); United States v. Associated Milk Producers, Inc., 534 F.2d 113, 116 n.3 (8th Cir.), cert. denied, 429 U.S. 940 (1976). Indeed, it is entirely speculative whether further litigation in the government suit would produce results helpful at all to TEC's private case. __/

3. Moreover, the primary issue that TEC seeks to raise (Motion at 7-9) is not yet ripe for decision. As the district court correctly noted (No. 82-952 J.S. App. 144), and TEC concedes (Motion at 9), the collateral estoppel effect in a later case of a judgment entered in earlier litigation is to be determined in the later case. Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 569 (1951). A disclaimer of liability, such as that included in the modification of final judgment here, is not necessarily conclusive. See Michigan v. Morton Salt Co., 259 F. Supp. 35, 62-64 (D. Minn. 1966), aff'd sub nom., Hardy Salt Co. v. Illinois, 377 F.2d 768 (8th Cir. 1967). If TEC brings a private suit and the judgment in the government case is not given collateral estoppel effect, TEC can appeal from that decision at that time. __/

__/ Should TEC file a private antitrust action, it is free to make use of all the trial record material in the government's 1974 suit against AT&T, where, as TEC notes (Motion at 2), AT&T's "efforts to prevent TEC from selling its products were relied upon by the government as part of its case-in-chief."

__/ TEC's contention (Motion 10-11) that the district court abused its discretion in entering the consent judgment as in the public interest because it did not include a provision that would enable private plaintiffs to invoke collateral estoppel is plainly without merit.

It is therefore respectfully submitted that the motion to intervene should be denied.

REX E. LEE
Solicitor General

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Nos. 82-952, 82-992, 82-953 & 82-1001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF MARYLAND, *et al.*, PEOPLE OF THE STATE OF ILLINOIS, TANDY CORPORATION, and NORTH AMERICAN TELEPHONE ASSOCIATION,

Appellants,

vs.

UNITED STATES OF AMERICA and WESTERN ELECTRIC COMPANY and AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Appellees.

On Appeal From The United States District Court For The District of Columbia

AT&T's RESPONSE TO THE MOTION OF TELEPHONICS EQUIPMENT CORPORATION FOR LEAVE TO INTERVENE

HOWARD J. TRIENENS*
ALFRED A. GREEN
JIM G. KILPATRIC
195 Broadway
New York, New York 10007
(212) 393-5111

GEORGE L. SAUNDERS, JR.
JOHN D. ZEGLIS
DAVID W. CARPENTER
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

Attorneys for Appellees Western Electric Company and American Telephone And Telegraph Company

*Counsel of Record

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Nos. 82-952, 82-992, 82-953 & 82-1001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF MARYLAND, *et al.*, PEOPLE OF THE STATE OF ILLINOIS, TANDY CORPORATION, and NORTH AMERICAN TELEPHONE ASSOCIATION,

Appellants,

vs.

UNITED STATES OF AMERICA and WESTERN ELECTRIC COMPANY and AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Appellees.

On Appeal From The United States District Court For The District of Columbia

AT&T's RESPONSE TO THE MOTION OF TELEPHONICS EQUIPMENT CORPORATION FOR LEAVE TO INTERVENE

Telephonics Equipment Corporation ("TEC") moves to intervene in these appeals to challenge the entry of the MFJ on a ground that none of the appellants in the case have sought to raise. TEC claims that the District Court abused its discretion in entering the Modification of Final Judgment ("MFJ") because the District Court "sought to limit the use that may be made of the consent decree by private parties" (pp. 7–10) and allegedly did not consider "the public benefit, if any, to be derived, from a determination of the issues at trial" (pp. 10–11). Even assuming, *arguendo*, that there were any reason or basis for allowing TEC to participate, its challenges to the entry of the MFJ are so lacking

in merit that they should not delay the expeditious consideration of these appeals or stand in the way of affirmance of the judgment below.

1. TEC's claim that it should now be permitted to intervene is extraordinary. Approximately 110 entities either moved to intervene in this case in the District Court between January 8, 1982 and August 24, 1982, or filed briefs in response to the District Court's Order of May 25, 1982. These 110 entities represent every segment of the public and include scores of competitors of Bell System companies, many of which, unlike TEC, had already asserted private antitrust claims against the Bell System. The District Court allowed each of these entities to intervene to appeal the entry of the MFJ. J.A. 191–194, 201–03. TEC not only did not file a timely petition to intervene in the District Court (J.A. 201–03), but TEC waited until December 15, 1982—one week *after* the jurisdictional statements were filed—to file its motion in this Court. The sole reason given for this delay is that TEC had thought that a party to the case would present the issues TEC now seeks to raise.[1] To allow TEC to interject itself into these proceedings at this time would disserve orderly procedure *especially* if it could in any way delay—as it need not—the expeditious resolution of the appeals.

2. TEC's claims on the merits are frivolous. The District Court fully complied with the Congressional directive that it *consider* "the impact of [a consent decree's] entry upon private plaintiffs who claim specific injury" from the violations alleged and the "public benefit, if any, to be derived from a determination of these issues at trial." 15 U.S.C. §16(c)(2). Although it recognized that "the ultimate decision with respect to this issue must rest with the court in which such litigation may be brought," J.A. 144, the

[1]Contrary to TEC's misstatement (p. 6), Jack Faucett Associates, Inc. *did* "perfect" an appeal raising these issues. Jack Faucett, however, voluntarily dismissed its appeal on December 8, 1982, presumably because it recognized the appeal to be meritless.

District Court concluded that the judgment probably would not be given prima facie effect in future private litigation, under §5(a) of the Clayton Act, 15 U.S.C. §16(a). J.A. 142–44. It found that the absence of prima facie or collateral estoppel effect was not a sufficient reason to refuse to enter the MFJ and attempt to force the United States to continue to litigate its claims, especially because the Government will assist private plaintiffs by making the trial record in *United States* v. *AT&T*, No. 74-1698 (D.D.C.), available to them. J.A. 35 n. 93.

TEC's argument that the District Court "limited the use that may be made of the consent decree by private parties" is nonsense. The District Court expressly recognized that it could *not* affect a private plaintiff's use of the MFJ and *held*—in accordance with the arguments of both AT&T and the United States and the very decisions TEC cites (pp. 8–9 & n. 1)—that the question of what effect the MFJ will have in future private suits is committed to "the court in which such litigation may be brought." J.A. 144; *accord*, *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558, 569–71 (1951).[2]

Nor is there any basis for TEC's related argument (pp. 9–10) that the District Court abused its discretion in entering a decree that did not, by its terms, adjudicate antitrust liability and that therefore appeared not to be entitled to prima facie effect in

[2]For example, in *State of Michigan* v. *Morton Salt Co.*, 259 F.Supp. 35, 61–63 (D. Minn. 1966), *aff'd on other grounds sub nom. Hardy Salt Co.* v. *State of Illinois*, 377 F.2d 768 (8th Cir.), *cert denied*, 389 U.S. 912 (1967), the District Court held that the fact that a consent judgment provided that it did not adjudicate antitrust liability did not prevent the court in a future private suit from deciding whether it is "consistent with the purpose of Section 5(a)" not to give the decree prima facie effect. Whether *Morton Salt* is correct or whether it has any applicability to the facts of the case at bar, it establishes that the question of the prima facie effect of the MFJ is a question for another case, not for these appeals.

private suits. Congress recognized that approximately eighty percent of all Government antitrust cases end in consent decrees "in which the defendant does not admit to having violated the law as alleged in the Complaint." S.Rep. No. 93-298, 93d Cong., 1st Sess., p. 5 (1973); *accord*, H.R. Rep. No. 93-1463, 93d Cong., 2d Sess., p. 6 (1974). The legislative history makes it explicit that the Tunney Act "is not intended" to force a District Court to reject such proposed decrees and make the government "go to trial for the benefit of potential private plaintiffs." S. Rep. No. 93-298, *supra*, pp. 6–7; H.R.Rep. No. 93-1463, *supra*, p. 8. Where, as here, a consent decree achieves the Justice Department's antitrust objectives, Congress "believe[d] that in the majority of instances the interests of private litigants can be accommodated without the risk, delay, and expense of the government going to trial" by, for example, the Antitrust Division's making available information and evidence obtained by the government. S.Rep. No. 93-298, *supra*, pp. 6–7; H.R.Rep. No. 93-1463, *supra*, p. 8. In view of the Antitrust Division's commitment to make its materials available to private plaintiffs (J.A. 35 n. 93) and the fact that large and small private plaintiffs have pursued actions against AT&T even without this assistance (*id.*), there is no basis for any claim that the District Court abused its discretion.

The Bell System's single objective is to end the uncertainty that threatens the national telephone network at the earliest possible time. TEC's substantive claims are so frivolous that they need not stand in the way of the prompt resolution of these appeals.

Whether TEC's motion to intervene is granted or denied, the judgment should be affirmed.

Respectfully submitted,

HOWARD J. TRIENENS*
ALFRED A. GREEN
JIM G. KILPATRIC
195 Broadway
New York, New York 10007
(212) 393-5111

GEORGE L. SAUNDERS, JR.
JOHN D. ZEGLIS
DAVID W. CARPENTER
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

Attorneys for Appellees
Western Electric Company
and American Telephone
And Telegraph Company

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*Counsel of Record

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-952

STATE OF MARYLAND, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

No. 82-953

TANDY CORP., APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY OF TELEPHONIC EQUIPMENT CORPORATION TO RESPONSES TO ITS MOTION FOR LEAVE TO INTERVENE

In their responses to Telephonic Equipment Corporation's ("TEC") Motion for Leave to Intervene, both the United States and AT&T fault TEC for not seeking leave to intervene in a timely manner before the district court. While their criticisms are not directly relevant to TEC's motion in this Court, they are unfounded and a brief reply would seem appropriate.

On April 20, 1982, TEC filed comments with the district court in which it urged modifications of the decree that would assist plaintiffs asserting private claims against defendants. Numerous other persons also filed comments on or about that date. After reviewing those comments, in a Memorandum dated May 25, 1982, Judge Greene invited supplemental briefs on eight specific substantive topics and called on persons filing supplemental briefs to advise "what status those subscribing to the briefs request with respect to further proceedings herein." (May 25 Memorandum, p. 5). The May 25 Memorandum did not request additional briefing on "private plaintiff" issues such as those that TEC had earlier raised. In reliance on the court's statement that "omission of a topic implies no judgment on its merits but only on the need for further briefing," May 25 Memorandum, p. 3, n.7, TEC filed no supplemental brief, and accordingly did not seek intervenor status at that time.

Following the Court's rejection of TEC's proposals in its August 11 opinion, and August 24 order, TEC promptly sought leave to intervene (on September 1, 1982).

Dated: New York, New York
January 4, 1983

Respectfully submitted,

Grant S. Lewis

Grant S. Lewis
(Counsel of Record)
520 Madison Avenue
New York, New York 10022
(212) 715-8000